A Plain Meaning Interpretation of ERISA's Preemption and Saving Clauses: In Support of a State Law Preemption of Section 1132(a) of ERISA's Civil Enforcement Provisions

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TABLE OF CONTENTS

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I. INTRODUCTION

Assume that you have just accepted an associate attorney position at a top-notch national law firm with offices on the east coast and on the west coast, and with clients in several different states throughout America. Instead of the standard $125,000 a year starting salary for an associate with your stellar credentials, your starting salary is only $95,000, but the law firm persuaded you to take the job by promising a nice bonus if your yearly billable hours totaled at least 2500 hours. To further sweeten the pie, the law firm promised that you would receive the best health insurance with extensive medical coverage and no deductibles.

On the first day of work at the law firm, while filling out various employment papers, you discovered that the law firm offers, as an employee benefit plan, only one Health Maintenance Organization (HMO) funded by an insurance policy from an insurance company. And, to obtain the promised heath coverage, you must enroll in that HMO. Being young, healthy, and smart, you enrolled in the HMO, thinking that you probably would not need medical care before your one year anniversary with the firm, which was the length of time that you expected to work for that law firm. However, two months into that job, you developed severe stomach pains. Your HMO primary care physician diagnosed an ulcer, that he attributed to stress from your having to work so hard as a beginning associate, and prescribed medication to treat the condition. When the pain would not go away, that physician treated your pain by prescribing different types of medication over the next six-month period. Finally, after some prodding, the physician telephoned the HMO's utilization reviewers and requested authorization to send you to a specialist.

However, the utilization reviewers rejected the request because they believed that a specialist was not medically necessary. Therefore, the primary care physician continued his efforts to control your pain by prescribing yet another type of medication. But, the pain would not go away. So, on your own volition and at your own expense, you went to a specialist. After several x-rays and other diagnostic procedures, the specialist diagnosed stomach cancer and scheduled you for immediate surgery. The specialist told you that the primary care physician's failure to diagnose the stomach cancer when he first treated you has caused a thirty-three percent reduction in your chance of survival and that, given the specific type of cancer, your prognosis is not good.

You engaged an attorney who filed a five million dollar lawsuit against the HMO and the primary care physician, alleging general negligence against the former and medical malpractice against the latter.

Months into the litigation, the physician gave you a nice settlement. However, the HMO filed a motion for summary judgment against you, alleging that the Employment Retirement Income Security Act (ERISA)[1] preempts your state tort lawsuit and that your only recourse is to file a federal lawsuit under ERISA's civil enforcement provisions, where your damages will be limited to the monetary value of the denied benefit—which at a minimum will be the $150.00 out of pocket expense that you incurred when you first saw the specialist, and which at a maximum will be the total dollar amount you spent on all medical care from the

1. 29 U.S.C. §§ 1001–1461 (2000). An ERISA plan is any medical benefit plan that an employer offers to its employees and beneficiaries when the employer's business affects interstate commerce. 29 U.S.C § 1002 (2000). When an employee or beneficiary who receives medical benefits under an ERISA plan suffers an injury because either the ERISA plan or an HMO administrator of the plan improperly denies medical benefits, the employee can bring a civil cause of action for damages under relevant state statutory or tort law. Or, the employee may file a lawsuit under § 1132(a) of ERISA's civil enforcement provisions. 29 U.S.C. § 1132(a) (2000). If the employee brings the lawsuit under state law, ERISA's preemption clause will preempt it if it "relates to" the ERISA plan by having either a "reference to" or a "connection with" the plan. *See infra* note 8 and accompanying text. *See generally* Larry J. Pittman, *ERISA's Preemption Clause: Progress Towards a More Equitable Preemption of State Laws*, 34 IND. L. REV. 207, 216 (2001) (discussing court cases that analyze whether various types of state statutory and tort laws are preempted by ERISA's preemption clause).

On the other hand, if the injured employee files a claim under § 1132(a) of ERISA's civil enforcement provisions, the employee's remedies are limited to either an injunction, a clarification of rights to the benefits, or a damage award that equals the monetary value of the benefits that were denied by the plan or its HMO administrator. 29 U.S.C. § 1132(a). However, because § 1132(a) does not allow compensatory and punitive damages, many injured employees will file state law claims and hope that they will escape ERISA's preemption. One way to avoid ERISA's preemption is to show that the state law claim is premised upon a state law insurance regulation under the protection of ERISA's saving clause. 29 U.S.C. § 1144(b)(2)(A) (2000). There will be no preemption if the saving clause does protect the law or lawsuit, and the employee may pursue a state law claim. However, the employee still might not be able to get compensatory and punitive damages if the claim for damages conflicts with the types of limited remedies that § 1132(a) offers. This is so because the Supreme Court has implied that one cannot use the saving clause to protect a state law or lawsuit from preemption when that state law or lawsuit seeks compensatory damages, punitive damages, or both, as such damages are not allowed under § 1132(a). Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51–57 (1987).

Therefore, the main purpose of this Article is to show that, pursuant to a plain meaning interpretation of ERISA's saving clause and preemption clause, the Court should hold that a state law or lawsuit that falls within the scope of the saving clause escapes preemption by both ERISA's preemption clause and by § 1132(a)'s civil enforcement remedies. In other words, § 1132(a) does not preempt the field of permissible remedies for an injured employee. Rather, an employee whose lawsuit falls within ERISA's saving clause's scope should be able to obtain compensatory and punitive damages. This article is dedicated to proving the accuracy of that conclusion.

specialist. The HMO cited case law establishing that you are not entitled to compensatory and punitive damages because such damages are not allowable under § 1132(a) of ERISA's civil enforcement provisions.[2] While researching your response to the motion, you and your lawyer discovered a state statute providing the following:

> (1) Each Health Maintenance Organization shall provide a mechanism for the timely review by a physician holding the same class of license as the primary care physician, who is unaffiliated with the [HMO], jointly selected by the patient . . ., primary care physician and the [HMO] in the event of a dispute between the primary care physician and the [HMO] regarding the medical necessity of a covered service proposed by a primary care physician. In the event that the reviewing physician determines the covered service to be medically necessary, the [HMO] shall provide the covered service.[3]
> (2) An HMO which does not inform its enrollees that they have the right to an independent external review as provided in subpart 1 above shall be liable for any compensatory damages that an enrollee suffers from being denied an external review.

Therefore, the lawyer amended your complaint to add a state statutory cause of action for the HMO's failure to inform you that you had a right to an independent external review of the HMO's denial of your primary care physician's request for a referral to the specialist. In response, the HMO's lawyers amended the HMO's motion for summary judgment to allege that ERISA preempts the state statutory claim because § 1132(a) of ERISA's civil enforcement provisions provides the only cause of action for the alleged improper denial of the specialist, and that § 1132(a) does not provide for compensatory damages.[4] The trial judge granted the motion for summary judgment, accepting the HMO's arguments regarding the scope of § 1132(a) and its impact on your case. The relevant federal circuit court of appeals affirmed. You are now contemplating whether you should file a writ of certiorari seeking review before the Supreme Court of the United States.

Your attorney tells you that several of ERISA's statutory provisions will influence the Court's decision if it accepts the appeal. ERISA's preemption clause, § 1144(a), provides that certain provisions of ERISA will "supersede any and all State laws insofar as they may now or

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2. *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 261 (1993) (asserting that one is not entitled to compensatory damages under § 1132(a)). Throughout this Article, references are made to § 1132(a) of ERISA's civil enforcement provisions, instead of to § 502(a), which is frequently cited in court opinions instead of § 1132(a). However, these two cites refer to the exact same ERISA statutory provision. *See* Pittman, *supra* note 1, at 211.

3. Section one of this hypothetical statute is exactly the same as the Illinois independent review statute that the Court, in *Rush v. Prudential HMO, Inc., v. Moran*, 536 U.S. 355, 361 (2002), upheld as not being preempted by § 1132(a) of ERISA's civil enforcement provisions. *Id.* at 386–87.

4. *See Mertens*, 508 U.S. at 254–55; *Pilot Life*, 481 U.S. at 54.

hereafter relate to any employee benefit plan" affecting interstate commerce.[5] ERISA's saving clause, § 1144(b)(2)(A), states that "[e]xcept as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."[6] And, § 1132(a) of ERISA's civil enforcement provisions establishes, in part, that a beneficiary of an employee benefit plan may bring a federal civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[7]

The attorney tells you that, given that your state law statutory claim "relates to" your health plan,[8] which is an ERISA protected plan, the Court will reverse the lower court's dismissal of the lawsuit only if it finds that ERISA's saving clause prevents the lawsuit from being preempted by § 1132(a) of ERISA's civil enforcement provisions. As such, your appeal presents a case of first impression on an issue that is tantamount to the last frontier of ERISA preemption jurisprudence. The primary issue is whether Congress has the legislative authority, despite the dictates of the Supremacy Clause, to enact a saving clause that exempt state laws from preemption even when such laws directly conflict with one of ERISA's statutory provisions. A resolution of this issue in the affirmative would continue the Court's erosion of the scope of ERISA's preemption, and it would pay homage to the much needed changes that have already occurred in this area of federal preemption.[9]

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5. 29 U.S.C. § 1144(a).

6. 29 U.S.C. § 1144(b)(2)(A). Throughout this Article, the Author uses the phrases "saving clause-protected state law" and "saving clause-protected law." These phrases mean that the state law regulates insurance under the terms of ERISA's saving clause by satisfying the two-prong test that the Court established in *Kentucky Ass'n of Health, Inc. v. Miller*, 538 U.S. 329, 341–42 (2003).

7. 29 U.S.C. § 1132(a)(1)(B) (2000).

8. 29 U.S.C. § 1144(a). Under ERISA's preemption clause, a state law "relate[s] to" an ERISA plan if it has a "reference to" or a "connection with" an ERISA plan. Larry J. Pittman, "*Any Willing Provider*" *Laws and ERISA's Saving Clause: A New Solution For an Old Problem*, 64 TENN. L. REV. 409, 427 n.83 (1997). A "connection with" exists when a state law "chang[es] the structure or the administration of the plan." *Id*. As such, the hypothetical state statute (given that it imposes an independent external review process upon an HMO's benefit review procedures) changes the structure of an ERISA plan, thereby establishing a "connection with" the plan that is sufficient enough for ERISA to preempt the statute unless ERISA's saving clause exempt the law from preemption. *See id*.

9. *See generally* Pittman, *supra* note 1, at 237–68 (discussing cases that have reduced the scope of ERISA's preemption clause).

Most of that change has involved the direction in which the Court has taken its interpretation of the phrase "relate to" as contained in ERISA's express preemption clause. Changing course after approximately twenty-five years of expansively interpreting the preemption clause, the Court has moved from a very broad interpretation of "relate to," as announced in *Pilot Life v. Dedeaux*,[10] to a more practical, case-by-case evaluation that principally asks whether a disputed state law interferes with ERISA's purposes and objectives, as discussed in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*[11] If the state law does not interfere with such purposes then there will be no ERISA preemption of the law. As such, the Court has significantly narrowed the scope of ERISA's preemption.[12] And, the shifting of interpretation from the broad to the narrow has led to a plethora of state and federal court opinions that find no ERISA preemption of various state statutes and common law theories that regulate managed care organizations.[13]

In addition to the narrowing of the preemption clause's scope, the Court has broadened the parameters of ERISA's saving clause, which may mean that the saving clause will exempt more state laws from ERISA's preemption.[14] This Article takes a closer look at the Court's recent pronouncements regarding the saving clause and makes several assertions about the future path that the Court's saving clause jurisprudence should take. Primarily, this Article concludes that the Court's interpretation of the saving clause should be even broader than it presently is, so much so that the saving clause, when applicable, should preempt § 1132(a) of ERISA's civil enforcement provisions. In other

10. 481 U.S. 41, 47–49 (1987).

11. 514 U.S. 645 (1995). As a first look, the Court will still apply the definition of "relate to," "reference to" or "connection with," to see if it will "manifestly and clearly" answer the interpretative question. *See* Pittman, *supra* note 1, at 224 n.87. If such an analysis is insufficient, the Court will then evaluate the state law's impact on ERISA's purposes and objectives, principally the preemption clause's purpose of providing for uniform regulation of ERISA plans. *See id*.

12. Principally, there are two purposes that underlie ERISA. First, the general purpose of the statute is to create a statutory scheme that protects employees and other beneficiaries from an employer's or other benefit plan manager's fraud and abuse in managing an employee benefit plan. *See* Larry J. Pittman, *ERISA's Preemption Clause and the Health Care Industry: An Abdication of Judicial Law-Creating Authority*, 46 FLA. L. REV. 355, 357–61 (1994). Second, the purpose of ERISA's preemption clause is to create a national uniformity of the regulation of ERISA benefit plans such that an interstate plan will be able to operate under one set of rules and regulations without the financial cost or other inefficiencies that would result from different regulations by different states. *See id*.

13. *See* Pittman, *supra* note 1, at 237–68 (analyzing lawsuits and theories that escape preemption under the Court's new approach to ERISA's preemption).

14. *See infra* notes 16–26 and accompanying text.

words, the arguments that appear below establish that the Court should reverse the lower court's dismissal of the above-referenced hypothetical lawsuit.

Part II discusses the Court's most recent opinion interpreting ERISA's saving clause and it explains some of the possible implications flowing from that opinion. Part III shows how indecisive the Court has been when interpreting the saving clause, and it emphasizes how the Court has gone from a very broad to a more narrow interpretation of the clause. Part IV asserts that the Court should apply a plain meaning interpretation of the saving clause, one that extends the clause's application to the fullest extent of the Congressional intent that underlie the clause. Lastly, Part V concludes that the Court should not be concerned that a broad, plain meaning interpretation of the saving clause might lead to some state laws preempting such ERISA statutory provisions as § 1132(a) of ERISA's civil enforcement provisions, and that, if such destruction were to occur, it would be in furtherance of Congress' intent that states should have broad authority when regulating insurance.

II. A SAVING CLAUSE PROGRESSION TOWARDS MORE FEDERALISM

ERISA's saving clause states: "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."[15] The Court's most recent decision interpreting ERISA's saving clause shows that the Court may be moving towards a more expansive interpretation. In *Kentucky Ass'n of Health, Inc. v. Miller*,[16] the Court held that the saving clause exempted Kentucky's "Any Willing Provider" (AWP) law from ERISA's preemption.[17] Arguably, this decision enlarges the scope of ERISA's saving clause, and it should lead to more state laws being exempted from preemption. The expansion of the saving clause's scope is evidenced by the Court's adoption of a new two-prong test for determining when a state law is exempted from preemption: (1) "the state law must be specifically directed toward entities engaged in insurance," and (2) "the state law must substantially affect the risk pooling arrangement between the

15. 29 U.S.C. § 1144(b)(2)(A) (2000).
16. 538 U.S. 329 (2003).
17. *See id*. at 335–36.

insurer and the insured."[18]

Analytically, courts should not encounter much difficulty when applying the first prong.[19] But, the second prong—"substantially affect the risk pooling arrangement"—is more challenging. First, in *Miller*, the Court abandoned the use of the McCarran-Ferguson Act's (MFA) three-factor analysis because ERISA's saving clause's language requires only that a state law "regulates insurance," and not that the law regulates a practice that is a part of "the business of insurance," as required by the MFA.[20]

This distinction, between the language of the saving clause and the language of the MFA, arguably expands the types of laws that ERISA's saving clause will protect from preemption. One category of protected laws consists of laws that impose preconditions on insurance companies' and other risk-bearing entities' permission to conduct business within a state. AWP laws fall within that category; and therefore, they escape ERISA's preemption, under the *Miller* Court's rationale.

> By expanding the number of providers from whom an insured may receive health services, AWP laws alter the scope of permissible bargains between insurers and insureds in a manner similar to the mandated-benefit laws we upheld in *Metropolitan Life*, the notice-prejudice rule we sustained in *UNUM*, and the independent-review provisions we approved in *Rush Prudential*. No longer may Kentucky insureds seek insurance from a closed network of health-care providers in exchange for a lower premium. The AWP prohibition substantially affects the type of risk pooling arrangements that insurers may offer.[21]

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18. *Id*. at 1479. Prior to *Miller*, the Court interpreted ERISA's saving clause by applying both a "common sense" understanding of "regulates insurance" and the three-factor analysis under the McCarran-Ferguson Act: (1) "'whether the practice has the effect of transferring or spreading a policyholder's risk'"; (2) "'whether the practice is an integral part of the policy relationship between the insurer and the insured'"; and (3) "'whether the practice is limited to entities within the insurance industry.'" Pittman, *supra* note 8, at 440–41. Given that the first and second factors of the three-factor analysis are no longer a part of an ERISA's saving clause analysis, there is reason to believe that *Miller*'s new interpretation of the saving clause will exempt more laws from ERISA's preemption.

19. The first prong has been a part of an ERISA's saving clause analysis for more than a decade and therefore courts have developed some expertise in its application. *See Pilot Life*, 481 U.S. at 50 (asserting that, to regulate insurance, a state law "must be specifically directed toward that industry"). *See also* Pittman, *supra* note 8, at 442–47 (discussing cases that apply the first prong).

20. *Miller*, 538 U.S. at 339–40. Apparently, the Court's older cases incorporated the MFA's three-factor analysis into an ERISA saving clause analysis because both the saving clause and the MFA appear to have the same purpose of granting states regulatory control over the insurance industry. John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank, 510 U.S. 86, 100 (1993).

21. *Miller*, 538 U.S. at 338-39 (citations omitted). However, there are some preconditions that will not "substantially affect the risk pooling arrangement" between the insured and insurer. For example, in *Miller*, the Court referenced that ERISA's

The gist of the above-quoted statement is that a state law's preconditions or other obligations, such as an AWP law, must have a substantial impact on insurers' and insureds' abilities to negotiate for different types of insurance arrangements than the one that the state law mandates. However, beyond this broad statement, the scope of the "substantially affect the risk pooling arrangement" requirement is not clear; and, the Court must clarify that requirement on a case-by-case basis during future litigation.[22]

But, a second category of state laws, those that mandate the terms and conditions of insurance arrangements, should easily meet the "substantially affect the risk pooling arrangement" test. Like the AWP law at issue in *Miller*, mandated-benefit laws limit the types of policies and contracts that insurers can offer to their insureds. Consistent with the Court's prior opinion, these types of laws should continue their preemption-exempt status under *Miller*'s new two-prong test.[23]

A third category of state laws that will normally satisfy the "substantially affect the risk pooling arrangement" requirement includes those laws that impose utilization review requirements, that establish external review obligations (like the above-referenced hypothetical statute), that mandate other procedures and conditions on the types of benefits that insurers must offer the insured, and that regulate the manner in which insurers must provide medical benefits.[24]

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saving clause would not exempt a hypothetical state law mandating that insurance companies pay their "janitors twice the minimum wage" because such a law would not have the requisite effect on the insured-insurer relationship. *Id.* at 338. But, the Court's opinion regarding minimum wages lends itself to exceptions. One could argue that, if in exchange for having to pay such wages, the insurer raises its premiums and changes the terms and conditions of its policies (by dropping certain coverage), even a minimum wage law might have a substantial impact on the risk pooling arrangement. Therefore, generalization about the types of laws that the saving clause will protect are not helpful. Instead, a case-by-case evaluation of a disputed state law's terms and conditions and the effects thereof on the insured-insurer's relationship is necessary to determine whether the saving clause exempts a state law for ERISA's preemption.

22. It seems that the "substantially affect" language is somewhat vague. Therefore, it is possible that, as with an ERISA's preemption clause analysis, the Court might find that some state laws' effect on the insured-insurer's relation is "too tenuous, remote, or peripheral." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983).

23. *See* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 758 (1985) (holding that ERISA's saving clause exempted a state's mandated benefit law from ERISA's preemption).

24. It seems that state laws falling within the scope of the third category of laws will satisfy the second prong of the *Miller* test because they limit the types of insurance arrangements into which insurers and insureds can enter. *See supra* text accompanying

It appears that state laws that fall within the third category, similar to mandated-benefit laws, dictate the terms and conditions that insurers and the insured must include within their contractual arrangements. These types of laws normally have a substantial effect on insurance contracts and other risk pooling arrangements between the insurer and the insured. Such effects might even impose substantial operating costs on insurers, including the costs of disputed medical benefits in states that have binding independent review requirements.[25]

Given that at least section one of the above-referenced hypothetical state statute falls within the third category of saving clause-protected laws, ERISA's saving clause will exempt section one from preemption. For example, in *Rush v. Prudential HMO, Inc. v. Moran*,[26] the Court held that ERISA's saving clause exempted from preemption the same type of binding independent external review requirement.[27]

However, neither *Rush* nor *Miller* is dispositive on whether section two of the hypothetical state statute can grant compensatory damages when § 1132(a) of ERISA's civil enforcement provisions does not allow such damages. At best, the real benefit of *Miller* might be that it shows that the Court can expansively interpret ERISA's saving clause and can abandon old analytical tests like the MFA's three-factor analysis.

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note 18.

25. In *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), the Court stated the following regarding the increase in operating cost that an HMO might suffer from being subjected to the state's binding independent review procedures:

> And although the added compliance cost to the HMO may ultimately be passed on to the ERISA plan, we have said that such "indirect economic effects," are not enough to preempt state regulation even outside of the insurance context. We recognize, of course, that a State might enact an independent review requirement with procedures so elaborate, and burdens so onerous, that they might undermine §1132(a). No such system is before us.

Id. at 381 n.11 (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 659 (1995)).

In addition to the added costs of having to institute procedures consistent with a state's binding independent review procedures—costs that an HMO directly bears, and that ERISA plans indirectly bear when the HMO shifts the cost to the plans—binding external reviews have the potential of shifting the final decisions on who bears the risk of loss from the insurer to an external reviewer who may be more receptive to the insureds' claims for benefits because the external reviewer will not normally have the same conflict of interest that insurers generally have. This shifting of the decisions on who bears the risk of loss might ultimately take benefits out of the plan that would remain in the plan under a system without independent external review.

At the end of the day, the *Rush* majority did not find that either the costs of instituting a binding independent review procedure, or the ultimate cost of the risk of loss when an external reviewer reverses an HMO's benefit decision, warranted a conclusion that ERISA's saving clause did not exempt the state law at issue in *Rush* because of an alleged conflict with the purposes of § 1132(a). *Id.* at 386–87.

26. 536 U.S. 355 (2002).

27. *See id*. at 387.

Additionally, *Miller* can serve as a good springboard from which the Court will start interpreting ERISA's saving clause as broadly as Congress intended. Along these lines, the Court should give ERISA's saving clause an interpretation that is even broader than *Miller*. More specifically, the Court should recognize and enforce Congress' intent that states should have the authority under ERISA's saving clause to grant remedies to the insured that are inconsistent with § 1132(a) of ERISA's civil enforcement provisions.

Such recognition has much implication for the above-referenced hypothetical lawsuit. First, *Rush* is precedent that ERISA's saving clause would protect section one of the hypothetical state statute from ERISA's preemption. But, given that *Rush* did not involve a provision like section two of the hypothetical statute, it is not sufficient authority that section two escapes preemption. Therefore, one must review other relevant cases to see whether they resolve the ultimate issue of whether a state law can successfully provide compensatory and punitive damages that conflict with § 1132(a), a section that does not provide for such remedies.

However, a brief analysis of the Court's saving clause jurisprudence shows that the Court has not been consistent in its interpretation of the clause—alternating between a broad and a narrow interpretation. This analysis reveals that the Court appears more likely to give a narrow interpretation of the saving clause when there is a conflict between a state law and § 1132(a), as section two of the hypothetical state statute presents. The Court's predisposition is primarily based upon the Court's mistaken belief about the scope and the application of the Supremacy Clause.[28]

III. THE COURT'S INDECISIVENESS OVER THE SCOPE OF ERISA'S SAVING CLAUSE

A. A Broad Interpretation

In *Metropolitan Life Insurance Co. v. Massachusetts*,[29] the Court, for

28. *Harris Trust*, 510 U.S. at 98 ("ERISA leaves room for complementary or dual federal and state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated."); *see also Rush Prudential HMO*, 536 U.S. at 377 (asserting, in dictum, that when a conflict arises between a saving clause-protected state law and § 1132(a) remedies, the state law "los[es] out").

29. 471 U.S. 724 (1985).

the first time, engaged in a substantive analysis of ERISA's saving clause—one that was outcome determinant.[30] The Court held that ERISA's saving clause exempted from preemption a Massachusetts state law mandating that insurance companies provide "specified minimum mental-health-care benefits" to their insured.[31] The Court held that the saving clause was applicable because the state law "regulate[d] the terms of certain insurance contracts," thereby meeting the "common-sense view" of an insurance regulation.[32] Significantly, the *Metropolitan Life* Court opposed a narrow reading of the saving clause when it rejected an argument that the saving clause is applicable only when a state law does not conflict with one of ERISA's substantive provisions.[33] Instead, the Court used a plain meaning interpretation of ERISA's saving clause, and of ERISA's deemer clause, to support its opinion that there were no limitations on the saving clause other than the deemer clause and the saving clause's own language.[34] As such, *Metropolitan Life*'s broad interpretation of the saving clause supports an argument that a saving clause-protected state law trumps even inconsistent ERISA substantive provisions.[35]

Subsequently, the Court continued its broad interpretation of the saving clause in *FMC Corp. v. Holliday*[36] in which the Court held that

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30. *See id*. at 739–47.

31. *See id.* at 727, 744.

32. *Id*. at 740.

33. *See id*. at 746–47. In *Metropolitan Life*, the Court rejected the lower court's contention that the saving clause "save[s] only state regulation unrelated to the substantive provisions of ERISA"; or that it is applicable only when a state law "directly regulate[s] the insurer," or when it regulates such "matters as the way in which insurance may be sold." *Id*. at 746–47, 741.

34. *See id*. at 746. The Court stated:

> We therefore decline to impose any limitation on the saving clause beyond those Congress imposed in the clause itself and in the "deemer clause" which modifies it. If a state law "regulates insurance," as mandated-benefit laws do, it is not preempted. *Nothing in the language, structure, or legislative history of the Act supports a more narrow reading of the clause, whether it be the Supreme Judicial Court's attempt to save only state regulations unrelated to the substantive provisions of ERISA*, or the insurers' more speculative attempt to read the saving clause out of the statute.

Id. at 746–47 (emphasis added). This quote from *Metropolitan Life* directly addresses the conflict between § 1132(a) and a saving clause-protected state law. In effect, the Massachusetts Supreme Judicial Court reasoned that the saving clause would not protect a state law that conflicts with one of ERISA's substantive provisions, which includes § 1132(a). *See id.* However, the majority opinion in *Metropolitan Life* did not accept such a limitation. *See id*. In other words, the Court, by implication, held that the saving clause, when applicable, being limited only by its language and the deemer clause, exempts state laws from preemption even when they conflict with one of ERISA's substantive provisions, such as § 1132(a).

35. *See supra* note 34 and accompanying text. For a further discussion of the deemer clause, see *infra* note 76 and accompanying text.

36. 498 U.S. 52 (1990).

ERISA's saving clause would have saved a Pennsylvania anti-subrogation law had the ERISA plan not been self-insured.[37] Although not specifically addressing whether the anti-subrogation law conflicted with § 1132(a), the *Holliday* Court stated that the only limitation on the application of ERISA's saving clause is ERISA's deemer clause.[38] The Court stated: "Unless the statute is excluded from the reach of the saving clause by virtue of the deemer clause, therefore, it is not pre-empted."[39] The Court further reasoned that "the saving and deemer clauses employ differing language to achieve their ends—*the former saving, except as provided in the deemer clause*, 'any law of any State which regulates insurance.'"[40]

A fair reading of these statements from *Holliday* supports a conclusion that ERISA's saving clause's preemptive effects are such that a state law, which is within the coverage of the saving clause, preempts ERISA's own statutory provisions given that ERISA's deemer clause is the only limitation on the scope of the saving clause. That conclusion is consistent with the Court's opinion in *Metropolitan Life*,[41] and it means that § 1132(a) is not a limitation that would prevent a saving clause-protected law from imposing remedies that are different than those contained in § 1132(a). However, the Court soon found a way to backtrack from *Metropolitan Life*'s and *Holliday*'s broad interpretation of the saving clause.

B. A Narrow Interpretation

In addition to *Pilot Life*'s holding that ERISA's saving clause did not exempt Mississippi's bad faith law from preemption,[42] the Court's dictum implied that one cannot use the saving clause to exempt a saving clause-protected law from preemption if the law conflicts with § 1132(a) of ERISA's civil enforcement provisions.[43] As such, the Court held that ERISA's saving clause did not save the bad faith lawsuit from preemption because the lawsuit sought compensatory and punitive

37. *Id*. at 61–62. The state law prohibited insurance companies and health plans from obtaining subrogation of funds that ERISA beneficiaries obtain from third-party tortfeasors. *Id.* at 55.
38. *Id*. at 61.
39. *Id*.
40. *Id*. at 64 (emphasis added).
41. *See supra* note 34 and accompanying text.
42. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987).
43. *See id*. at 52–57.

damages that are not allowable under § 1132(a).[44] Primarily, the Court used field preemption to assert that § 1132(a)'s remedies are the exclusive remedies for an alleged "improper processing" of a request for benefits under an ERISA plan.[45]

One can argue that *Pilot Life*'s narrowing of the scope of ERISA's saving clause is inconsistent with *Metropolitan Life* and *Holliday*. In other words, *Pilot Life* asserted that § 1132(a) is a limitation on the scope of a state law that falls within the scope of ERISA's saving clause, while *Metropolitan Life* and *Holliday* stated that the deemer clause is the only limitation on a saving clause-protected law. Subsequently, the Court has indicated that it might follow *Pilot Life*'s narrow interpretation.

For example, in *John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*,[46] a case of first impression, the Court considered the legal effects of a direct conflict between a saving clause-protected state law and one of ERISA's statutory provisions.[47] At issue was a state law mandating that an insurance company manage its general accounts by considering "'the interests of all of its contractholders, creditors and shareholders,' [and that it] 'maintain equity among its various constituencies.'"[48] This state law conflicted with an ERISA fiduciary provision that requires that an ERISA fiduciary manage a plan

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44. *Id*. at 54. The *Pilot Life* Court stated:

> In *Metropolitan Life Ins. Co. v. Massachusetts*, . . . this Court rejected an interpretation of the saving clause of ERISA's express pre-emption provisions, § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), that saved from pre-emption "only state regulations unrelated to the substantive provisions of ERISA," finding that "[n]othing in the language, structure, or legislative history of the Act" supported this reading of the saving clause. *Metropolitan Life*, however, did not involve a state law that conflicted with a substantive provision of ERISA. Therefore the Court's general observation—that state laws related to ERISA may also fall under the saving clause—was not focused on any particular relationship or conflict between a substantive provision of ERISA and a state law. In particular, the Court had no occasion to consider in *Metropolitan Life* the question raised in the present case: whether Congress might clearly express, through the structure and legislative history of a particular substantive provision of ERISA, an intention that the federal remedy provided by that provision displace state causes of action. Our resolution of this different question does not conflict with the Court's earlier general observations in *Metropolitan Life*.

Pilot Life, 481 U.S. at 56–57.

45. Field preemption occurs when "the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

46. 510 U.S. 86 (1993).

47. *Id*. at 97–98.

48. *Id*. at 97 (quoting Steven H. Goldberg & Melvin S. Altman, *The Case for the Nonapplication of ERISA to Insurers' General Account Assets*, TORT & INS. L.J. 475, 477 (1986)).

"'*solely* in the interest of the participants and beneficiaries and . . . for the *exclusive purpose* of . . . providing benefits to participants and their beneficiaries.'"[49] Following the rationale of *Metropolitan Life* and *Holliday*, the Court could have held that the state law preempted ERISA's fiduciary obligation because the law fell within the scope of ERISA's saving clause and because it did not run afoul of ERISA's deemer clause.[50]

Instead, the Court held that ERISA envisioned a dual regulation of the business of insurance by states and the federal government through ERISA's statutory provisions.[51] The Court asserted that, in this zone of dual regulation, normal rules of federal preemption apply such that federal regulations will preempt state regulations when the state "law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. . . ."[52] To support this conclusion, the Court relied upon language from the district court's opinion, asserting that "we discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis."[53]

Therefore, finding a conflict between the state law regulation of an insurer's general account funds and ERISA's fiduciary obligations regarding such accounts, the Court held that ERISA's fiduciary obligations preempted the state regulations, and that these fiduciary obligations were applicable to issues involving John Hancock's management of the general account.[54]

Although at first blush *Harris Trust* appears to be a straightforward application of the Supremacy Clause, a more exacting analysis shows that the Court made a mistake when it concluded that there was no evidence that Congress had an intent "to alter traditional preemption analysis."[55] Justice Ginsburg, the author of the majority opinion in *Harris Trust*, did not do a very thorough analysis of Congress' intent regarding the legal effects of a conflict between a saving clause-protected state law and one of ERISA's statutory provisions. For example, instead of relying upon a plain meaning statutory interpretation and the canons of statutory construction that are supportive of such an

49. *Id.* (quoting 29 U.S.C. § 1104(a)).
50. *See supra* text accompanying notes 29–40.
51. *Harris Trust*, 510 U.S. at 98.
52. *Id*. at 99 (citation omitted).
53. *Id*.
54. *See id*. at 101.
55. *Id*. at 99.

interpretation, Justice Ginsburg applied an opposing rule: "To answer that question, we examine first the language of the governing statute, guided not by 'a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy.'"[56] Curiously, this quote is from *Pilot Life*, wherein the Court, instead of specifically examining ERISA's saving clause's and preemption clause's statutory language, analyzed ERISA's legislative scheme and the alleged purpose of § 1132(a). The *Pilot Life* Court concluded that a broad interpretation of the saving clause (to save Mississippi's bad faith law from preemption) would be inconsistent with the goal of § 1132(a) providing the exclusive remedies for violations within the scope of § 1132(a), including claims against an ERISA plan for alleged improper processing of requests for benefits.[57]

But, in relying upon *Pilot Life*'s dictum regarding the exclusivity of § 1132(a), Justice Ginsburg jumped the gun too quickly.[58] She went too rapidly to a reconciliation of the various purposes of ERISA's saving clause, of the MFA, and of field preemption.[59] Before beginning her analysis of ERISA's statutory purposes, Justice Ginsburg should have paid closer attention to ERISA's statutory language and to several rules of statutory interpretation that were in existence when the Court decided

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56. *Id*. at 94–95 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)) (alteration in original). Although other court cases, in addition to reviewing the explicit language of a preemption clause, have examined the "'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law," Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996) (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992)), such an analysis, even when used to achieve a result that is different from the plain meaning interpretation as discussed in this Article, will not resolve the issue of whether Congress intended that a saving clause-protected law can preempt § 1132(a) of ERISA's civil enforcement provisions. This is because neither ERISA's legislative history, nor anything else that Congress has said about the scope of § 1132(a), or about ERISA's preemption clause and saving clause, even remotely warrants the conclusion that Congress intended that § 1132(a) preempt a saving clause-protected law. Furthermore, to the extent that the Court is committed to the rule that there must be a "clear and manifest" showing that Congress intended to preempt a state law "historic police powers" regulation, *Medtronic*, 518 U.S. at 471, then the Court should be more willing to apply a plain meaning interpretation of ERISA's preemption clause and saving clause because neither ERISA's statutory language nor its legislative history shows that Congress had a "clear and manifest" intent that § 1132(a) preempts a state law insurance regulation that provides for remedies that are different from those contained in § 1132(a). Rather, given the clear plain meaning language of the preemption clause and saving clause, the only logical conclusion is that Congress clearly and manifestly intended that a saving clause-protected state law preempt § 1132(a), even when such a law provides different remedies.

57. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52–57 (1987).

58. *Harris Trust*, 510 U.S. at 94–95.

59. *See id*. at 97–101.

Harris Trust. These rules of construction are: (1) "'[t]he question whether a certain state action is pre-empted by federal law is one of congressional intent'";[60] (2) "'[t]he purpose of Congress is the ultimate touchstone'"[61] of statutory interpretation; (3) the *unambiguous* text of a statute is the primary source from which the Court will garner Congressional intent because "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration";[62] and (4) when interpreting the language of an express preemption clause and an express saving clause, the Court "need not go beyond that language to determine whether Congress intended" that state law be preempted.[63]

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60. *Gade*, 505 U.S. at 96 (1992) (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985)).

61. *Medtronic*, 518 U.S. at 485 (quoting Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992)).

62. Mertens v. Hewitt Assocs., 508 U.S. 248, 261 (1993).

63. *Medtronic*, 518 U.S. at 484. In *Medtronic*, the Court stated:

> [W]e are presented with the task of interpreting a statutory provision that expressly pre-empts state law. While the pre-emptive language of § 360k(a) means that we need not go beyond that language to determine whether Congress intended the MDA [Medical Device Amendment] to pre-empt at least some state law, we must nonetheless "identify the domain expressly pre-empted" by the language.

Id. (quoting *Cipollone*, 505 U.S. at 517).

It should also be noted that the Court also stated:

> Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. [*Gade*, 505 U.S. at 111 (Kennedy, J., concurring)]. *Also* relevant, however, is the "structure and purpose of the statute as a whole," as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Id. at 486 (quoting *Gade*, 505 U.S. at 98). The only way that the Court can justify a refusal to use a plain meaning interpretation of ERISA's preemption clause and saving clause is to somehow rely upon this statement from *Medtronic* to allege that allowing a saving clause-protected state law to provide an alternative cause of action and remedies would be inconsistent with the "statutory framework" underlying § 1132(a)'s civil enforcement remedies. *Id*. This seems to be the legal import of the *Pilot Life* Court's inference that § 1132(a) prohibits a state from offering remedies that are different than those provided in § 1132(a). Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987). But, such a rationale is not persuasive because it undermines states' abilities to regulate insurance and because it cuts against the Court's own canon of interpretation that Congress is presumed to intend the interpretation that stems from a statute's plain language. *Cf*. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (regarding the interpretation of a statute that did not involve a saving clause, the Court stated that "[t]he first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case'") (quoting Robinson v. Shell

Given these rules of statutory interpretation, the *Harris Trust* Court should have first determined whether the language of ERISA's preemption clause and saving clause is unambiguous. The Court's failure to perform such an evaluation is even more questionable given subsequent cases that the Court has decided. For example, in *Circuit City Stores, Inc. v. Adams*,[64] a post *Harris Trust* decision, the Court recently reaffirmed that, when the statutory text is clear, there is no need to refer to, or rely upon, legislative history when interpreting a statute.[65] Consistently, in *Barnhart v. Sigmon Coal Co.*,[66] the Court stated: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[67]

These rules of construction for unambiguous statutes are applicable to an interpretation of ERISA's saving clause, ERISA's preemption clause, and to an inquiry regarding a saving clause-protected state law's ability to preempt § 1132(a) of ERISA's civil enforcement provisions. In the final analysis, because of the *Harris Trust* Court's failure to conduct a thorough analysis of the language of ERISA's preemption clause and saving clause, and to follow its own rules of statutory interpretation, *Harris Trust* should have little or no precedential value on whether a saving clause-protected state law can preempt § 1132(a) of ERISA's civil enforcement provisions.

In asserting that the Court should apply a plain meaning interpretation of ERISA's saving clause and ERISA's preemption clause to determine the supremacy of a saving clause-protected state law, this Author does

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Oil Co., 519 U.S. 337, 340 (1997)).

64. 532 U.S. 105 (2001).

65. *Id.* at 119 ("As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision.").

66. 534 U.S. 438 (2002).

67. *Id.* at 461–62 (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)). Some might argue that courts should not apply a plain meaning interpretation of an unambiguous statute when the statute "contain[s] conflicting provisions." *Id.* at 461. To support such an argument, one might further state that ERISA's saving clause itself (or a saving clause-protected state law that imposes remedies different from those stated in § 1132(a)) conflicts with § 1132(a). And, therefore, courts should not limit themselves only to a review of the language of ERISA's preemption clause and saving clause. However, such arguments have no merit because a saving clause-protected state law, even if it imposes remedies that are different from § 1132(a)'s remedies, does not conflict with § 1132(a) because § 1132(a) does not apply when a state law falls within the scope of ERISA's saving clause. In such cases, § 1132(a) does not apply because the controlling law is the exempted saving clause-protected state law. Therefore, courts should continue to apply a plain meaning interpretation of ERISA's preemption clause and saving clause at least when determining the nature of the state laws that ERISA's saving clause exempts from preemption.

not mean to imply that the Court should never disregard a plain meaning interpretation of a saving clause and a preemption clause. However, to do so, at a minimum the Court should justify such action by showing that the plain meaning language of either a preemption clause or a saving clause clearly conflicts with another statutory provision (or with clear and undisputable legislative history) that conclusively shows that Congress' intent is different than that expressed in the plain meaning language. Using other statutory provisions and legislative history to disregard the plain meaning language of a preemption clause and saving clause arguably is one of the rationales that underlie the Court's prior observations that the Court will sometimes go beyond the language of a statute, including a preemption clause and a saving clause, and look at the "'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."[68]

However, even when one acknowledges that sometimes it is permissible for the Court to go beyond a plain meaning interpretation and look at the "structure and purpose of the statute as a whole," such an approach will not resolve the issue whether a saving clause-protected state law can preempt § 1132(a) of ERISA's civil enforcement provisions.[69] This is because neither § 1132(a), nor any of ERISA's scant legislative history, clearly and manifestly shows that Congress intended that § 1132(a) preempt a saving clause-protected state law. Rather, given that Congress apparently drafted ERISA's saving clause to ensure that states have the authority to regulate insurance, as provided for in the MFA, the best conclusion is that a state insurance regulation, even when it provides different remedies than those provided in § 1132(a), presumptively trumps § 1132(a). This is especially true given that both ERISA's preemption clause and ERISA's saving clause more clearly provide for a saving clause protected state law's preemption of § 1132(a) than do other statutory provisions of ERISA, or any legislative history references, provide for § 1132(a)'s preemption of a saving clause-protected state law.

68. *Medtronic*, 518 U.S. at 486 (quoting *Gade*, 505 U.S. at 98).
69. *Id.*

IV. THE COURT SHOULD APPLY A PLAIN MEANING INTERPRETATION OF ERISA'S PREEMPTION AND SAVING CLAUSES

The Court in *Harris Trust*, being aware that it had previously stated in other opinions that it would interpret a statute according to its clear and unambiguous language, should have either followed a plain meaning statutory interpretation,[70] or it should have given some reasonable explanation for not doing so. Instead, the majority opinion, in adopting the lower court's assertion, simply stated: "In accord with the District Court in this case, however, we discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis."[71]

Such an assertion is inadequate and unjustified because ERISA's preemption clause clearly and unambiguously shows that Congress did intend to change "traditional preemption analysis."[72] ERISA's preemption clause clearly provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.[73]

An honest plain meaning deconstruction of the preemption clause is instructive regarding its scope. The "first phrase" of ERISA's preemption clause—"*[e]xcept as provided in subsection (b) of this section*"—is an exception to the "second phrase"—"*the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefits plan . . . .*"[74] The second phrase is the operative language of ERISA's preemption clause. The first phrase refers to ERISA's saving clause, contained in subsection (b). When one reads the second phrase and the first phrase together, these phrases provide that ERISA's preemption clause will preempt any state law that "relate[s] to" an ERISA plan unless ERISA's saving clause saves the state law from preemption.[75] Furthermore, the only limitation on the saving clause is ERISA's deemer

70. Instead of examining the specific language of ERISA's preemption clause and saving clause, the *Harris Trust* Court engaged in an analysis of the Supremacy Clause's impact when a saving clause-protected state law has provisions that are different than one of ERISA's substantive provisions. *See* John Hancock Mut. Life Ins. Co. v. Harris Trust & Savs. Bank, 510 U.S. 86, 97–101 (1993).

71. *Id*. at 99 (citation omitted).

72. *Id*.

73. 29 U.S.C. § 1144(a) (2000).

74. *Id.* (emphasis added).

75. *Id.*

clause, which prevents state laws from deeming ERISA plans to be insurance companies for the purpose of regulating them under ERISA's saving clause.[76]

A further deconstruction of ERISA's preemption clause's language shows that a saving clause-protected state law escapes ERISA's preemption even when the state law conflicts with one of ERISA's substantive provisions. For example, when the preemption clause's language speaks of preemption of state laws, it does so regarding certain "*provisions of this subchapter*" superseding state laws.[77] Importantly, the "*provisions of this subchapter*" language refers to Subchapter I of ERISA, which includes ERISA's "fiduciary responsibility" provisions in §§ 1101–1114 and ERISA's "administration and enforcement" provisions in §§ 1131–1147, which includes § 1132(a) of ERISA's civil enforcement provisions.[78]

When the second phrase of ERISA's preemption clause is read in conjunction with the first phrase, the meaning of ERISA's preemption clause is that certain sections of ERISA will preempt state laws except when such state laws regulate insurance under ERISA's saving clause.[79] More specifically, it means that ERISA's fiduciary provisions (as at issue in *Harris Trust*) and ERISA's civil enforcement provisions (such as § 1132(a)) will preempt state laws except when such state laws regulate insurance within the scope of ERISA's saving clause. It should

76. 29 U.S.C. § 1144(b)(2)(B) (2000). *See* Metro. Life Ins. v. Massachusetts, 471 U.S. 724, 746 (1985) ("We therefore decline to impose any limitation on the saving clause beyond those Congress imposed in the clause itself and in the 'deemer clause' which modifies it."); *see also* FMC Corp. v. Holliday, 498 U.S. 52, 61 (1990) (stating that the only way a state law can be excluded from the saving clause is by the deemer clause). ERISA's deemer clause is an exception to the saving clause, in that the saving clause does not apply if the deemer clause is applicable. *Metro. Life*, 471 U.S. at 733. The Court has interpreted the deemer clause to mean that, pursuant to ERISA's saving clause, states can regulate the "business of insurance," except that states cannot deem an ERISA plan itself "to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for the purpose of any State law purporting to regulate insurance companies . . . ." *Id*. In other words, when the deemer clause is interpreted consistently with the saving clause, states can regulate insurance companies that supply insurance policies to ERISA plans, including the terms of those insurance policies and the other incidents of the "business of insurance," but states cannot either directly regulate ERISA plans themselves, or regulate self-funded ERISA plans. *See id*.

77. *See supra* text accompanying note 73.

78. For a review of the ERISA statutory provisions that are contained within this subchapter, which is subchapter I of ERISA, see the table of contents that precedes ERISA's statutory provisions. 29 U.S.C. §§ 1001–1461 (2000).

79. 29 U.S.C. § 1144(a).

be clearly noted that because ERISA's preemption clause is an express preemption clause, express preemption applies, instead of conflict preemption or field preemption.[80] In other words, the statutory language of ERISA's express preemption clause is outcome determinant, pursuant to the Court's own rules of statutory construction: "We [the Court] have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[81]

Given the Court's own canon of statutory interpretation, one can make a cogent argument that the Court erroneously decided *Harris Trust*. This is because ERISA's preemption clause, being an express preemption clause, expressly provides that ERISA's fiduciary standards (being one of "the provisions of this subchapter") do not supersede or preempt a state law regulation of insurance, such as the law at issue in *Harris Trust*.[82]

This same general conclusion applies to *Pilot Life*'s speculation that § 1132(a) would preempt an inconsistent state law insurance regulation. In other words, § 1132(a) does not preempt a state law regulation that satisfies the saving clause test because ERISA's express preemption clause provides that the civil enforcement provisions (being one of the "provisions of this subchapter") do not supersede or preempt a state law that falls within the scope of ERISA's saving clause.[83]

Fortunately, in most of its ERISA preemption cases, the Court has not confronted a situation where an argument is made that a specific section of ERISA, such as § 1132(a), preempts a state law that regulates insurance under the saving clause's protection.[84] The main thrust in many of the Court's prior cases is that the relevant state law, despite not conflicting with one of ERISA's substantive provisions, stands as an obstacle to ERISA's preemption clause's purpose of providing for a

80. The *Harris Trust* Court erroneously reasoned that field preemption applies when a saving clause-protected state law conflicts with one of ERISA's substantive provisions. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 99 (1993) (asserting that "'where [that] law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs") (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (alteration in original)). Instead of field preemption, express preemption principles apply when there is an express preemption clause. Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996) (citation omitted).

81. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461–62 (2002) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)).

82. *See supra* text accompanying note 73.

83. *Id*.

84. Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 377 (2002).

uniformity of regulation of ERISA welfare benefit plans.[85] In some of those cases, the Court has held that a state law that has the potential of creating disuniformity "relates to" an ERISA plan and is therefore preempted unless ERISA's saving clause exempts the law from preemption.[86] But, now the real divide for ERISA's saving clause jurisprudence is whether the Court will interpret ERISA's saving clause such that a saving clause-protected state law will actually preempt a conflicting ERISA statutory provision. The main theme of this Article is that ERISA's preemption clause's language, as analyzed above, establishes that a saving clause-protected state law does preempt inconsistent ERISA statutory provisions contained in subchapter I, including ERISA's fiduciary provisions and § 1132(a) of ERISA's civil enforcement provisions.

However, in its last pronouncement on the issue of § 1132(a)'s preemptive effects, in *Rush Prudential HMO, Inc. v. Moran*,[87] the Court stated its support for *Pilot Life*'s reference that § 1132(a) preempts a state law that is within the scope of ERISA's saving clause if the law creates "alternative causes of action and alternative remedies."[88] But, because the Court's decision in *Rush* did not involve a conflict between § 1132(a) and a saving clause-protected state law, *Rush*'s discussion is mere dictum.[89] That dictum provides:

85. *See generally* Pittman, *supra* note 1, at 237–68 (discussing cases that interpret ERISA's preemption clause); Pittman, *supra* note 12, at 393 (same).

86. *See* Pittman, *supra* note 1, at 246–48.

87. 536 U.S. 355 (2002).

88. *Id*. at 381.

89. *See id.* at 386 (holding that the binding independent review law "imposes no new obligation or remedy like the causes of action considered in *Russell*, *Pilot Life*, and *Ingersoll-Rand*").

Having tacitly accepted *Pilot Life*'s dicta, and concluded that the state law fell within the scope of ERISA's saving clause, *see id*. at 375, the *Rush* Court reasoned that there was no conflict with § 1132(a) because the relevant binding independent review provision of the state law did not create either an alternative cause of action or an alternative remedy to those provided in § 1132(a). *See id*. at 386. The Court reached this conclusion despite the fact that the state law made the independent reviewer's decision binding on the HMO. *See id*. at 379–80. Apparently, in the Court's opinion, the reason why the law did not create an alternative cause of action or alternative remedy is that a beneficiary, complaining about denied benefits, would still have to file a civil enforcement claim under § 1132(a)'s civil enforcement provisions, and that beneficiary would still be seeking only denied benefits, which is the only monetary remedy allowable under § 1132(a), and not compensatory or punitive damages.

> Although we have yet to encounter a forced choice between the congressional policies of exclusively federal remedies and the "reservation of the business of insurance to the States," [Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 744 n.21 (1985)], we have anticipated such a conflict, with the state insurance regulation losing out if it allows plan participants "to obtain remedies . . . that Congress rejected in ERISA."[90]

Several observations about the above-quoted statement, which shows that the Court is leaning toward a definitive holding that § 1132(a) would trump a saving clause-protected state law, are instructive. First, to support its dictum, the Court relied upon three of its prior cases. However, the Court correctly noted that these three cases did not involve a direct conflict between ERISA's statutory provisions and a saving clause-protected state law.[91] For example, in *Massachusetts Mutual Life Insurance Co. v. Russell*,[92] the Court simply referred to the extensiveness of § 1132(a)'s civil enforcement provisions as evidence that the Court should not imply a private right of action under ERISA for compensatory and punitive damages.[93] That case did not involve a saving clause-protected state law; as such, *Russell* is really not applicable to a situation where there is a conflict between § 1132(a) and a saving clause-protected state law. Unless, of course, one wants to incorporate *Russell*'s broad statements about § 1132(a)'s exclusiveness into an analysis involving such a conflict, instead of applying the clear and unambiguous language of ERISA's preemption clause and saving clause, which provides that the deemer clause is the only limitation on the scope of ERISA's saving clause.[94]

The thrust of this Article is that *Russell* should not be forced into an analysis involving such a conflict because the *Russell* Court's comments about the exclusiveness of § 1132(a)'s remedies are nothing more than the Court's own policy arguments regarding Congress' intent with respect to the scope of permissible remedies under an ERISA plan. Such policy arguments circumvent and cut against the Court's own canon of statutory interpretation that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[95] Given that canon of interpretation, and the fact that ERISA's preemption clause's language, in a plain meaning fashion, clearly and unambiguously states that ERISA's civil enforcement provisions (such as § 1132(a)) do

90. *Id*. at 377 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987)).

91. *See id.* (citing Metro. Life Ins. v. Massachusetts, 471 U.S. 724, 744 n.21 (1985); *Pilot Life*, 481 U.S. at 54).

92. 473 U.S. 134 (1985).

93. *Id*. at 147–48.

94. *See id.*; *see also supra* text accompanying notes 73–79.

95. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 462 (2002) (Stevens, J., dissenting) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)).

not preempt a saving clause-protected state law, the logical conclusion is that, despite *Russell*'s conclusions regarding the extensiveness of § 1132(a), a saving clause-protected state law can preempt § 1132(a) by imposing different remedies, including compensatory and punitive damages. Furthermore, another one of the Court's cases, *Metropolitan Life Insurance Co. v. Taylor*,[96] which contains language regarding the exclusiveness of § 1132(a)'s remedies, does not destroy that conclusion.

In *Taylor*, the Court held that a beneficiary's claim for an alleged improper denial of disability benefits was removable to federal court because § 1132(a) provides a cause of action for the same alleged improper denial of benefits.[97] However, the *Taylor* Court recognized that the claim did not involve a saving clause-protected state law.[98] Thus, there was no conflict between § 1132(a) and a saving clause-protected state law. Therefore, *Taylor*, which is a case about complete preemption for removal jurisdiction purposes, is not relevant when a saving clause-protected state law conflicts with § 1132(a).[99]

Likewise, the Court's decision in *Ingersoll-Rand Co. v. McClendon*[100] did not involve a saving clause-protected state law's direct conflict with § 1132(a). Rather, the parties did not even raise the saving clause as an issue because the state law claim did not fall within the saving clause's scope.[101] Instead, *Ingersoll-Rand* is a simple conflict preemption case where ERISA's preemption clause preempted an employee's claim for compensatory and punitive damages because the claim was "related to" the ERISA plan given that it was "specifically designed to affect employee benefit plans" and that the existence of the plan was the essence of the plaintiff's claim.[102]

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96. 481 U.S. 58 (1987).
97. *Id.* at 66–67.
98. *See id.* (avoiding a discussion that ERISA's saving clause was applicable to the facts before the Court).
99. *See id*. at 66–67.
100. 498 U.S. 133 (1990).
101. *See id.* at 140–41.
102. *Id*. at 140. The employee's claim was premised upon an employer's alleged termination of the employee to avoid paying pension benefits to the employee. *Id*. at 135–36. In effect, the Court applied the "reference to" prong of the two-part definition of "relate to." The Court stated:

> [W]e have virtually taken it for granted that state laws which are "specifically designed to affect employee benefit plans" are pre-empted under § 514 (a) [ERISA's preemption clause]. . . . The Texas cause of action makes *specific reference to*, and indeed is premised on, the existence of a pension plan. In the words of the Texas court, the cause of action "allows recovery

But, despite the fact that neither *Russell*, *Taylor*, nor *Ingersoll-Rand* involves a direct conflict between § 1132(a) and a state law protected by the saving clause, the Court has used statements and holdings from these cases to imply that, when such a conflict does exist, § 1132(a) will preempt an inconsistent state law. For example, in *Rush*, the Court broadly interpreted *Ingersoll-Rand* to conclude that § 1132(a)'s purposes and policies preempt any state law or lawsuit that provides remedies that are different than those provided in § 1132(a).[103] However, that interpretation overlooks the fact that, in *Ingersoll-Rand*, the Court was not faced with a direct conflict between § 1132(a) and a state law that is within the scope of ERISA's saving clause.[104] Therefore, *Ingersoll-Rand*'s conflict preemption discussion, and other general comments about § 1132(a)'s purposes and policies, are not dispositive. Instead, the decisive fact is that, unlike in *Ingersoll-Rand*, the language in both ERISA's saving clause and preemption clause establishes that Congress' intent is that § 1132(a) does not preempt a state law that falls within the scope of ERISA's saving clause.[105]

Furthermore, the legislative history that the Court has previously relied upon to assert that ERISA's civil enforcement remedies are exclusive, is not dispositive. In *Taylor*, the Court relied upon a portion of ERISA's legislative history that provides: "All such actions [for

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> when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund. . . . Because the court's inquiry must be directed to the plan, this judicially created cause of action "relate[s] to" an ERISA plan.

Id. at 140 (emphasis added) (alterations in original).

103. Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 379 (2002). However, the Court's reliance upon *Ingersoll-Rand* is misplaced because the state law at issue was not a state insurance regulation under ERISA's saving clause; the only issue was whether ERISA's preemption clause preempted the state law claim because it related to an ERISA plan. Despite this conclusion, the Court in *Rush* somehow tried to use *Ingersoll-Rand* as precedent that state laws which provide additional remedies are preempted under *Pilot Life's* dicta that § 1132(a) provides the only remedies for enforcement of rights protected under ERISA. However, it should be noted that the *Pilot Life* Court stated its dicta while it was discussing whether ERISA's saving clause exempted Mississippi's bad faith law from preemption. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51–57 (1987). Therefore, a case like *Ingersoll-Rand*, which does not involve ERISA's saving clause, should not be used to support an argument that § 1132(a) preempts a saving clause-protected state law. As such, the *Rush* Court's reliance upon *Ingersoll-Rand* is misplaced because different considerations are involved when determining whether ERISA's preemption clause preempts a state law (as at issue in *Ingersoll-Rand*) than when determining whether ERISA's saving clause exempts a state law from preemption, as is at issue when one considers whether a saving clause-protected state law preempts § 1132(a). Therefore, the *Rush* Court's attempt to use *Ingersoll-Rand* to support its speculation about whether § 1132(a) would preempt a saving clause-protected law is tantamount to mixing apples and oranges.

104. *See Rush Prudential HMO*, 536 U.S. at 377.

105. *See supra* text accompanying notes 73–79.

denied benefits or for enforcement of rights to benefits] in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947 (LMRA)."[106] However, this statement cannot be taken literally. First, given the presence of ERISA's saving clause, the most logical conclusion is that the statement about section 301 is relevant only to a situation where the saving clause is inapplicable.[107] That is, by enacting a saving clause that exempts certain state laws from ERISA's preemption, Congress did not intend that saving clause-protected laws "aris[e] under the laws of the United States."[108] Instead, saving clause-protected laws are in furtherance of Congress' intent that states' regulation of insurance shall control.[109] No one can seriously argue that a state law regulation that falls within the saving clause's scope arises under federal law. Such laws arise under state law; therefore, ERISA's legislative history comments about section 301 are irrelevant.[110]

A few more words are in order regarding other portions of ERISA's

106. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987) (quoting H.R. CONF. REP. NO. 93-1280, at 327 (1974)).

107. The fact that the legislative history reference to section 301 is not applicable to a saving clause-protected state law is shown by the clear language of ERISA's preemption clause which provides that ERISA's civil enforcement provisions shall not supersede or preempt a state law within the scope of ERISA's saving clause. *See supra* notes 73–79. The irrelevancy of section 301 is especially shown if the Court's canon of interpretation—"when the words of a statute are unambiguous, then, the first canon is also the last: 'judicial inquiry is complete'"—is applied. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 462 (2002) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)).

108. *See* text accompanying *supra* note 106. It seems only logical that saving clause-protected laws, which states primarily enact under their insurance codes, arise under state law. Therefore, there is no need for exclusive federal jurisdiction over a lawsuit based upon such laws. Rather, state courts should have at least concurrent jurisdiction to interpret state insurance regulations and to resolve lawsuits premised upon such insurance regulations.

109. *See supra* text accompanying notes 73–79. Therefore, the best conclusion is that there should never be a complete preemption (for removal of a state lawsuit to federal court as implied by ERISA's legislative history references to section 301 of the LMRA) of a state lawsuit that is premised upon a state law that is within the scope of ERISA's saving clause.

Likewise, a saving clause-protected state law should escape substantive preemption under ERISA's preemption clause. Nonpreemption is the clear import of the language that Congress codified in ERISA's preemption clause and in its saving clause. *See id.*

110. That a saving clause-protected law arises under state law is further supported by ERISA's preemption clause's language which provides that ERISA's civil enforcement provisions, including § 1132(a), should not preempt a state law that falls within the scope of ERISA's saving clause. 29 U.S.C. § 1144(a) (2000).

legislative history that the Court has used to support its apparent belief that § 1132(a) has preemptive effects over a saving clause-protected state law. In addition to the Court's improper reliance upon section 301, the Court has identified at least three more principles that it has garnered from its review of ERISA's legislative history: (1) there is a need for uniformity of regulation of ERISA remedies; (2) there is a need for ERISA "administrators [to be able to] predict the legality of proposed actions without the necessity of reference to varying state laws";[111] and (3) "[t]he expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop . . . would make little sense if the remedies available to ERISA participants and beneficiaries under [§ 1132(a)] could be supplemented or supplanted by varying state laws."[112] Despite the Court's reliance upon these statements, such justifications do not offer a persuasive reason for the Court's apparent belief that § 1132(a) preempts a saving clause-protected state law that offers remedies that are different than the ones contained in § 1132(a).

First, the goal of uniform regulations, and of ERISA's administrators' ability to predict the parameters of applicable regulations, is already restricted by the mere presence of ERISA's saving clause, which evidences Congress' intent that ERISA benefit plans be subject to varying regulations if different states enact inconsistent laws to govern insurance companies, HMOs, and other entities that fall within the scope of ERISA's saving clause. Second, the belief that courts will develop federal common law is not hampered by states' enactment of saving clause-protected laws granting remedies that are different than the remedies of § 1132(a). In other words, courts will still be able to develop common law when either there is no relevant saving clause-protected state law, or when ERISA's saving clause is not applicable, as with self-insured ERISA plans.[113]

Therefore, given the presence of ERISA's saving clause, which gives states the authority to regulate insurance, the Court should be extremely careful when it relies upon legislative history references regarding uniformity and the development of common law. This is especially true because giving too much weight to such references might impermissibly undercut the policies that underlie Congress' intent regarding the scope of ERISA's saving clause.

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111. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (quoting 120 Cong. Rec. 29933 (1974)).

112. *Id*. at 56.

113. Because of the deemer clause, states cannot use ERISA's saving clause to regulate self-insured ERISA plans. *See supra* note 76 and accompanying text. Therefore, state law remedies are not applicable to self-insured plans, and courts will be free to develop common law to regulate such plans.

V. THE COURT'S UNREASONABLE CONCERN ABOUT "ERISA DESTROYING ITSELF"

Pursuant to the above discussion, there is no definitive reason why the Court and lower-level federal courts should not enforce ERISA's saving clause to the fullest extent of its plain meaning language. If this means that ERISA's saving clause will destroy certain portions of ERISA's civil enforcement provisions, then such destruction would be a necessary consequence of Congress' codification of a broad saving clause and a broad preemption clause in the same statute. Therefore, to respect Congress' intent, the Court should avoid using judicial activism, in the guise of statutory interpretation, to prevent the alleged destruction of ERISA.[114]

However, it is doubtful that the Court will be able to resist the urge to judicially legislate its own beliefs about the proper reconciliation of a conflict between § 1132(a) and a saving clause-protected state law. But, the cases that the Court has relied upon to support its belief about that reconciliation are distinguishable. For example, in *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*,[115] the Court held that the "filed rate doctrine," under the Communication Act of 1934, preempted both respondent's state law breach of contract claim and state law tortious interference with contract claim,[116] and that the saving clause of the Communication Act did not exempt the claims from preemption.[117] The Communication Act's saving clause provided: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."[118] The Court held that the saving clause did not save the state law claims from preemption because those claims were "'absolutely inconsistent with the provisions of the act,'" and therefore "'the act cannot be held to destroy itself.'"[119]

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114. The Court has recognized that any disuniformity of regulation from an application of ERISA's saving clause is due to Congress' putting the saving clause in the same statute that also has a broad preemption clause. Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 381 (asserting that "[s]uch disuniformities . . . are the inevitable result of the congressional decision to 'save' local insurance regulation") (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747 (1985)) (alteration in original).

115. 524 U.S. 214 (1998).

116. *Id*. at 226–27.

117. *Id*. at 227–28.

118. 47 U.S.C. § 414 (2000).

119. *AT&T*, 524 U.S. at 228 (quoting Tex. & Pac. Ry. Co. v. Abilene Cotton Oil

Similarly, in *Adams Express Co. v. Croninger*,[120] the Court held that section 20, the Carmack Amendment to the original Interstate Commerce Act, preempted a Kentucky state law that would have invalidated a carrier's contract provision which limited the carrier's liability for damaged property.[121] The Court found preemption because the Carmack Amendment regulated a carrier's liability to shippers,[122] and because Congress enacted the amendment to avoid a disuniformity of regulation under different state laws.[123] Relying upon the supremacy of federal regulation of interstate commerce, the Court held that the Carmack Amendment must preempt the inconsistent Kentucky state law.[124]

The Court rejected the shipper's claim that a saving clause to the Interstate Commerce Act saved Kentucky's state law from preemption.[125] That saving clause provides: "Except as otherwise provided in this part, the remedies provided under this part are in addition to remedies existing under another law or common law."[126] The Court held that the saving clause could not save the Kentucky law because "[i]t would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to."[127] The Court asserted that the saving clause preserves only those state laws that were "'not inconsistent with the rules and regulations prescribed by the provisions of [the] act,'"[128] and that "'the act cannot be said to destroy itself.'"[129]

Regardless of the correctness of the Court's decision as applied to the specific facts at issue in *Central Office Telephone* and *Croninger*, the Court's broad statement about an act not being allowed to destroy itself creates an excellent means by which the Court and lower-level courts can engage in judicial lawmaking in contravention of Congress' intent regarding the scope of a particular saving clause and its impact on the

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Co., 204 U.S. 426, 446 (1907). In the ERISA context, a saving clause-protected state law that allows remedies that are different than those provided for in § 1132(a) would not be "absolutely inconsistent with" § 1132(a) because, pursuant to the terms of ERISA's preemption clause, § 1132(a) would not be applicable. *See supra* text accompanying notes 73–79. Therefore, there would be no ERISA statutory provision that would be in conflict with the saving clause-protected law.

120. 226 U.S. 491 (1913).
121. *See id*. at 503–06.
122. *See id*.
123. *Id*. at 506.
124. *Id*. at 507.
125. *Id*. at 507–08.
126. Carmack Amendment to Interstate Commerce Act, 49 U.S.C. § 13103 (2000).
127. Adams Express Co. v. Croninger, 226 U.S. 491, 507 (1913).
128. *Id*. (quoting Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907)).
129. *Id*. (quoting *Abilene Cotton Oil Co.*, 204 U.S. at 446).

substantive provisions of a federal law.[130] To limit courts' abilities to disregard congressional intent, *Central Office Telephone*'s and *Croninger*'s statements about a federal statute not being allowed to destroy itself must be evaluated in the context of the specific language of a federal statute, including the statute's preemption clause and saving clause. In other words, if the language of a federal statute shows that Congress intended that the statute's saving clause exempt certain state laws from preemption even when those state laws might be inconsistent with the substantive provisions of the federal law itself, the Court should not, in the guise of statutory interpretation, stand in the way of the execution of that Congressional intent.[131] For example, the plain meaning language of ERISA's saving clause provides that "*nothing in this subchapter* shall be construed to exempt or relieve any person from *any* law of any State which regulates insurance, banking, or securities."[132] Given that § 1132(a) of ERISA's civil enforcement provisions is one of the provisions in "*this subchapter*," Congress' intent, as expressed in both ERISA's saving clause and preemption clause,[133] is that § 1132(a) should not preempt a state law that regulates insurance.[134]

In deference to Congressional intent, the Court should avoid applying its own rule of construction that a federal statute "cannot be held to destroy itself."[135] Congress' intent must control. If Congress, the body charged with enacting federal statutes, wants a statute's saving clause (when applicable) to destroy certain portions of a statute, the Court, as an interpreter of federal statutes, has no legitimate reason to complain about a saving clause destroying a statute. This is especially true when a statute has plain language that clearly shows that a saving clause and a preemption clause broadly exempt certain state laws from preemption.

ERISA's preemption clause specifically provides that the preemptive effects of ERISA's civil enforcement provisions (§ 1132(a)), being a

130. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1181 n.10 (3rd ed. 2000) (asserting that a court that does not enforce a saving clause as written "is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads, is pursuing a fundamentally lawless path").

131. *See supra* note 130 and accompanying text.

132. 29 U.S.C. § 1144(b)(2)(A) (2000) (emphasis added). The word "any" should be emphasized because Congress did not say that only consistent state laws are saved from preemption; rather, all state laws that regulate insurance escape ERISA's preemption.

133. *See supra* text accompanying notes 73–79.

134. *See id*.

135. Adams Express Co. v. Croninger, 226 U.S. 491, 507 (1913) (quoting Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907)).

provision of "this subchapter," is limited by ERISA's saving clause, as codified in subsection (b).[136] In other words, the preemption clause provides that except as provided in subsection (b) (ERISA's saving clause), § 1132(a) and certain other provisions of ERISA shall supersede or preempt certain state laws.[137] The saving clause, subsection (b), states that "nothing in this subchapter (which includes § 1132(a) of ERISA's civil enforcement provisions) shall be construed to exempt or relieve any person from *any* law of any State which regulates insurance, banking, or securities."[138] Clearly, the language of ERISA's saving clause and of ERISA's preemption clause is broad enough to exempt from preemption a state insurance regulation that offers different remedies than § 1132(a). Therefore, to the extent that the Court is an interpreter of laws and not a drafter of laws, it should have no problem with adopting the plain meaning interpretation that this Article has laid out, especially when one considers that Congress can amend ERISA to avoid any alleged destruction that might occur when a saving clause-protected state law preempts one of ERISA's substantive provisions.[139]

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136. 29 U.S.C. § 1144(a) (2000).

137. *Id.*

138. 29 U.S.C. § 1144(b)(2)(A) (2000) (emphasis added). *See also supra* text accompanying notes 73–80.

139. In non-ERISA contexts, the Court has relied upon Congress' ability to amend a federal statute as a reason for not overruling an erroneously-decided precedent. *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 362–63 (2000) ("The policy of *stare decisis* is at its most powerful in statutory interpretation (which Congress is always free to supersede with new legislation) . . . ."). Generally, the Author does not believe that a future Congress' ability to amend a federal statute is sufficient grounds for the Court's refusal to overrule an opinion that it has incorrectly decided by misinterpreting a past Congress' intent. *See* Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 818–19 (2002) (criticizing the position that Congress' future ability to amend a statute should be used as justification for not overruling an erroneously-decided statutory precedent). However, when applying a plain meaning interpretation to a federal statute, the Author does believe that a present or future ability by Congress to amend a federal statute is an important consideration. In contrast to a situation where the Court upholds one of its erroneously-decided statutory interpretation precedents (which the Court allegedly interpreted according to its understanding of the enacting Congress' intent) on the grounds that a future Congress can amend the statute if it does not agree with the erroneous interpretation, applying a plain meaning interpretation accepts the enacting Congress' true intent regarding the scope of a statute. By accepting the enacting Congress' original intent, the Court will be true to its prior statements that it will interpret a statute as written by Congress. Mertens v. Hewitt Assocs., 508 U.S. 248, 261 (1993).

Furthermore, the Court should not have any qualms about the impact of its plain meaning statutory interpretation—even when the Court fears that it should not interpret a saving clause in such a manner as to destroy a federal statute's substantive provisions—because a future Congress can amend the statute to alleviate any undesirable effects from the Court's plain meaning interpretation. Such reliance upon a future Congress' ability to amend a statute when it does not like the Court's plain meaning interpretation is supportable because, unlike where the Court attempts to use stare decisis to avoid

Of course, the Court can continue in its apparent belief that a saving clause should not be allowed to destroy a statute, as the Court's dictum in *Rush* implies.[140] The Court can even locate other cases to support its efforts. For example, in a non-ERISA case, *Buckman Co. v. Plaintiffs' Legal Committee*,[141] the Court stated "that neither an express pre-emption provision nor a saving clause 'bar[s] the ordinary working of conflict pre-emption principles.'"[142] But, the Court should not apply this rule of construction such that a saving clause-protected state law will never preempt an inconsistent federal statutory provision. A closer examination of the rule shows that, for support, the *Buckman* Court relied upon *Geier v. American Honda Motor Co*.[143] But in doing so, the *Buckman* Court should have recognized that, despite the *Geier* Court's statement that a saving clause and a preemption clause do not alter traditional conflict preemption, the *Geier* Court acknowledged that Congress' intent is controlling. For example, the *Geier* Court stated: "*Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations*."[144] From this quote, it is clear that Congress' intent, as expressed in the language of preemption clauses and saving clauses, is the paramount factor that should control the Court's decision on whether a saving clause will exempt an inconsistent state law from preemption, including whether a saving clause-protected state law can preempt § 1132(a) of ERISA's civil enforcement provisions.

Therefore, the Court should not use its own rules of construction to

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overruling an erroneously-decided precedent, reliance upon a future Congress' ability to amend a statute to avoid an unwanted plain meaning interpretation (that is a correct interpretation) is not an effort to support a Court's erroneously-decided interpretation about a past Congress' intent. Instead, it is an effort to defer to the original plain meaning congressional intent of a statute with the assurance that a future Congress can amend the statute to promote its own beliefs about the future scope of the statute, even when the belief is different from the intent of the enacting Congress.

140. Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 377–78 (2002).

141. 531 U.S. 341 (2001).

142. *Id*. at 352 (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000)) (alteration in original). This statement by the Court seems to be based upon its belief that the Supremacy Clause controls when there is a conflict between a state law and a federal law even when Congress has shown an intent that the state law should escape federal preemption. As such, this statement appears to be inconsistent with other cases by the Court that resolve federal preemption issues by a statutory construction of Congress' intent in favor of or against preemption. *See infra* note 175 and accompanying text.

143. 529 U.S. 861 (2000). *See also Buckman*, 531 U.S. at 352.

144. *Geier*, 529 U.S. at 869 (emphasis added).

thwart Congress' intent, especially given that there is no non-Court manufactured authority for the *Geier* Court's statement that "this Court has repeatedly 'decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'"[145] One wonders from whom the Court obtained its authority to not give broad effect to a saving clause, especially when a saving clause's language would allow a broad exemption from federal preemption.

Judge Richard A. Posner's comments are possibly instructive. "*The Supreme Court is a political court. The discretion that the justices exercise can fairly be described as legislative in character, but the conditions under which this 'legislature' operates are different from those of Congress*."[146] Unless the Court wants to be a superlegislature, is there any legitimate reason for the Court not to interpret a saving clause as broadly as its language allows, especially when the Court professes that Congressional intent guides its statutory interpretation and that statutory language is the clearest indication of Congressional intent?[147] At the very least, the Court should be cautious when using its judicial-lawmaking authority to restrict the scope of ERISA's saving clause. Along these lines, the Court should not use the Supremacy Clause to limit the reach of the saving clause.

VI. THE SUPREMACY CLAUSE DOES NOT RESTRICT THE SCOPE OF ERISA'S SAVING CLAUSE

The Supremacy Clause provides:

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145. *Id*. at 870 (quoting United States v. Locke, 529 U.S. 89, 106 (2000)) (alteration in original).

146. Richard A. Posner, *The Anti-Hero*, THE NEW REPUBLIC, Feb. 24, 2003, at 27, 30 (reviewing BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS (2003)) (emphasis added). More fully, Judge Posner states:

> The Supreme Court is a political court. The discretion that the justices exercise can fairly be described as legislative in character, but the conditions under which this "legislature" operates are different from those of Congress. Lacking electoral legitimacy, yet wielding Zeus's thunderbolt in the form of the power to invalidate actions of the other branches of government as unconstitutional, the justices, to be effective, have to accept certain limitations on their legislative discretion. They are confined, in Holmes's words, from molar to molecular motions. And even at the molecular level the justices have to be able to offer reasoned justifications for departing from their previous decisions, and to accord a decent respect to public opinion, and to allow room for social experimentation, and to formulate doctrines that will provide guidance to lower courts, and to comply with the expectations of the legal profession concerning the judicial craft. They have to be seen to be doing law rather than doing politics.

Id.

147. *See supra* text accompanying note 65.

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.[148]

It appears that the Court may try to use the Supremacy Clause to limit the application of ERISA's saving clause. In asserting that a saving clause in a federal statute cannot be used to destroy the substantive provisions of the federal statute,[149] the Court's reasoning appears to be based upon two propositions. The first proposition involves whether Congress intended that a saving clause-protected law preempts a substantive provision of a federal statute. The other is whether the Supremacy Clause prevents Congress from enacting saving clauses in federal laws that exempt state laws from federal preemption when the state laws conflict with the federal laws' substantive provisions.

Regarding the first proposition, the plain meaning language of ERISA's preemption and saving clauses shows that Congress did intend that a saving clause-protected state law can preempt certain ERISA substantive provisions, including § 1132(a).[150] It should be noted that the Court has already recognized that the interplay between ERISA's preemption clause and saving clause is unusual in that Congress does not normally take away an area of regulation from the states, as done in ERISA's preemption clause, and then return a portion of that regulation to the states, as done in ERISA's saving clause.[151] However, implicit from the fact that Congress included ERISA's saving clause within ERISA's statutory framework is the notion that Congress intended that some state laws avoid ERISA's preemption. The only open issue is whether Congress intended that courts interpret and apply ERISA's saving clause as broadly as the language contained in ERISA's preemption clause and saving clause. As argued above, a plain meaning

148. U.S. CONST. art VI, cl. 2.
149. *See supra* text accompanying note 90.
150. *See supra* text accompanying note 73.
151. Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739–40 (1985). The Court stated:

> The two pre-emption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general pre-emption clause broadly pre-empts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time.

Id.

interpretation of ERISA's preemption clause and saving clause provides that Congress intended that ERISA's saving clause be broadly applied, with ERISA's deemer clause being the only limitation on the scope of the saving clause,[152] a position that the Court accepted in its earlier cases where the scope of ERISA's saving clause was interpreted.[153] Therefore, given Congress' explicit intent regarding the scope of ERISA's saving clause, the Court should not use the Supremacy Clause to thwart that intent.

In considering whether the Supremacy Clause prevents the enforcement of a broad, plain meaning interpretation of ERISA's saving clause, the Court should be mindful that the Supremacy Clause has different implications depending upon the types of federal and state laws at issue. One category of federal laws is comprised of laws that regulate areas that the United States Constitution explicitly reserves for federal control. Such exclusive federal regulation includes such areas as the authority to make treaties with foreign countries and the authority to coin money.[154] In these and other exclusive areas of federal regulation, Congress could not enact a law or a saving clause that would give states the authority to make treaties, coin money, or do anything else that would contravene an explicit constitutional provision.[155] Instead, only an amendment to the constitution would avoid a preemption of a state law that is in conflict with an explicit constitutional provision.[156] One might call this type of federal preemption "explicit federal preemption."

On the other hand, when there is no explicit constitutional provision that proscribes state laws in a particular area, the Supremacy Clause should not prevent Congress from enacting federal laws that contain saving clauses that relegate certain areas for state law control, as Congress did when enacting ERISA's saving clause. Instead of "explicit federal preemption," one might call this area of preemption "discretionary federal preemption." The preemption is discretionary because, while legislating in areas within its legislative authority, Congress should have great discretion when deciding whether it should preempt state laws or whether it should allow state law regulation in certain areas. To deny Congress such discretion would be inconsistent with Congress' powers under the Necessary and Proper Clause to make those laws that it deems necessary to carry out its constitutional legislative authority.[157]

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152. *See supra* text accompanying notes 73–79.
153. *See supra* text accompanying notes 29–41.
154. TRIBE, *supra* note 130, at 1021.
155. *See id.*
156. *See id*. at 1021–23 n.5.
157. The Necessary and Proper Clause provides that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the

Before eroding Congress' powers to save certain state laws from federal preemption, the Court should interpret the Supremacy Clause in light of the fears, concerns, and purposes that motivated the founders to include the Supremacy Clause as a part of the proposed U.S. Constitution. For example, in Federalist Paper No. 33, Alexander Hamilton spoke of the interconnection between the Necessary and Proper Clause and the Supremacy Clause; and, the gist of his discussion is that the founders devised these clauses to ensure that states would not enact laws that would destroy or undermine the national government's supreme authority to create necessary and proper federal laws.[158] Hamilton states:

> The Convention probably foresaw what it has been a principal aim of these papers to inculcate that the danger which most threatens our political welfare, is, that the State Governments will finally sap the foundations of the Union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction.[159]

The debate among the founders during the drafting of the Federal Constitution shows that Hamilton's comments are correct. One of the founders' chief motivating reasons for drafting the Supremacy Clause was to prevent states from entering into treaties with foreign countries, from violating treaties that the federal government might enter into with foreign countries, and from enacting state laws that conflicted with federal laws that Congress might enact.[160] It appears that, in drafting the

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foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

158. THE FEDERALIST NO. 33, at 204–05 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

159. *Id*. at 205–06.

160. 2 1787 DRAFTING THE U.S. CONSTITUTION 1459–60 (Wilbourn E. Benton ed., 1986). The notes of some of the founders show that the Supremacy Clause was primarily motivated by state laws that attempted to undermine federal authority:

> MR. PINCKNEY moved "that the National Legislature should have authority to negative all laws which they should judge to be improper." He urged that such a universality of the power was indispensably necessary to render it effectual; that the States must be kept in due subordination to the nation; that if the States were left to act of themselves in any case, it would be impossible to defend the national prerogatives, however extensive they might be on paper; that the acts of Congress had been defeated by this means; nor had foreign treaties escaped repeated violations; that this universal negative was in fact the corner stone of an efficient national Government; that under the British Government the negative of the Crown had been found beneficial, and the *States* are more one nation now, than the *Colonies* were then.

Id. at 1459. Additionally, the notes show the following:

Supremacy Clause, the founders were attempting to promote the supremacy of the federal government over hostile state governments; they were mindful that some states would resist federal authority and seek to promote their own political and economic well-being to the detriment of the federal government.[161] Therefore, instead of interpreting ERISA's saving clause and the Supremacy Clause's impact on the saving clause in a vacuum, the Court should construe the Supremacy Clause in light of the anti-state encroachment on federal authority policy that motivated the founders' drafting of the Supremacy Clause. In doing so, the Court should acknowledge that the anti-state encroachment policy is not implicated when Congress enacts a federal statute like ERISA which contains a broad saving clause that allows states to enact laws that preempt some of ERISA's statutory provisions.

The policy underlying the Supremacy Clause is not implicated because the founders did not appear to be concerned with Congress itself granting states, through a saving clause, the authority to operate in particular areas that do not conflict with constitutional provisions that explicitly and exclusively reserve certain areas for federal regulation.[162] Rather,

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> MR. MADISON seconded the motion. He could not but regard an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect system. Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties; to infringe the rights and interests of each other; to oppress the weaker party within their respective jurisdictions.

Id. *See also* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 142 (1966) (discussing the states' violations of federal treaties with foreign countries and, in part, stating as follows: "The tendency of the States to these violations has been manifested in sundry instances").

After much debate over whether to give the federal government the power to review and negate an improper state law before it became an enforceable law, the founders decided against such a power, but they apparently drafted the Supremacy Clause to achieve the same result—a means of preventing states from undermining the federal government by enacting inconsistent state laws and by making and violating treaties with foreign governments. *See* 2 1787 DRAFTING THE U.S. CONSTITUTION, *supra*, at 1468–82.

161. 2 1787 DRAFTING THE CONSTITUTION, *supra* note 160, at 1461. Mr. Wilson, one of the founders, states:

> No sooner were the State Governments formed than their jealousy and ambition began to display themselves. Each endeavoured to cut a slice from the common loaf, to add to its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands. Review the progress of the articles of Confederation through Congress and compare the first and last draught of it. To correct its vices is the business of this convention. One of its vices is the want of an effectual controul in the whole over its parts. What danger is there that the whole will unnecessarily sacrifice a part? But reverse the case, and leave the whole at the mercy of each part, and will not the general interest be continually sacrificed to local interests?

Id. at 1461–62.

162. *See id*. at 1450–82.

the founders' concern was with states enacting inconsistent laws and violating treaties, in opposition to Congress' intent, when such state action was in contravention of a system of government based upon the supremacy of federal authority and laws.[163]

Furthermore, a court interpretation that Congress cannot enact a federal statute that has a saving clause, which saves certain state laws from preemption, would undermine Congress' authority under the Necessary and Proper Clause.[164] Such a decision would substantially limit Congress' discretion and ability to enact the types of laws that it deems necessary to protect its citizens. Congress would have less authority to strike the appropriate balance between state regulation and federal regulation. For example, in the ERISA context, Congress could no longer enforce its desire for complete state regulation of insurance, despite its apparent policy choice that states are in a better position to regulate insurance.[165] Clearly, ERISA's saving clause's mandate—that states can regulate insurance—is a policy decision that Congress has made to further its legislative authority to regulate ERISA plans for the protection of its citizens. If Congress thinks that it is necessary and proper for it to defer to state authority regarding insurance regulations, the Supremacy Clause should not be used to prevent or limit Congress' discretion in deciding the best means of protecting its citizens' ERISA plans. This is especially true because ERISA's saving clause is not within the scope of "explicit federal preemption," as the saving clause does not conflict with any provisions of the U.S. Constitution. Therefore, the Supremacy Clause is not implicated because its anti-state encroachment policy is not harmed when Congress, in its wisdom as the federal legislative body, and not a state government, has allowed state regulation in a particular area.

The Court should recognize that the real justification for its prior dictum, that an ERISA saving clause-protected law will not preempt an inconsistent ERISA statutory provision, is the Court's misguided efforts to enforce the Supremacy Clause when the Supremacy Clause is really not implicated in this area of discretionary federal preemption.[166] The

163. *See id*.
164. *See supra* note 157 and accompanying text.
165. This conclusion flows from the mere fact that Congress included the saving clause in ERISA's statutory framework.
166. Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 377 (2002) ("Although we have yet to encounter a forced choice between the congressional policies of exclusively federal remedies and the 'reservation of the business of insurance to the

Court's effort is misguided because, in the zone of discretionary federal preemption, the Supremacy Clause has no legal force or effect that is separate and distinct from Congress' intent regarding the permissible scope of state law regulation.[167] When discretionary federal preemption is applicable, the terms and conditions of federal statutes are the cornerstone of a federal preemption analysis under the Supremacy Clause.[168] If Congress wants inconsistent state law regulation in a certain field, the Supremacy Clause does not prevent Congress from drafting a statute that allows such inconsistent state law regulation.[169]

States,' [Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 744 n.21 (1985)], we have anticipated such a conflict, with the state insurance regulation losing out if it allows plan participants 'to obtain remedies . . . that Congress rejected in ERISA.'") (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987)); John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 100 (1993) (asserting that "in the case of a direct conflict [between a state law and one of ERISA's statutory provisions], federal supremacy principles require that state law yield") (citation omitted). *See also* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234 (2000) ("As the Supreme Court and virtually all commentators have acknowledged, the Supremacy Clause is the reason that valid federal statutes trump state law."). *But see* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 785 (1994) (asserting that "[t]he Necessary and Proper Clause, and not the Supremacy Clause, provides the source and constitutional justification for Congress's power to preempt state lawmaking capacity").

167. In *Ingersoll-Rand Co. v. McClendon*, the Court stated:

> We must decide whether these provisions [including ERISA's preemption clause, section 1140, and section 502(a) of ERISA's civil enforcement provision], singly or in combination, pre-empt the cause of action at issue in this case. "*[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchstone.*'"

498 U.S. 133, 137–38 (1990) (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985)) (emphasis added).

168. *See supra* note 63 and accompanying text.

169. As a matter of fact, the Supreme Court has recognized the possibility that Congress can enact a federal statute with a saving clause that preserves state laws that are inconsistent with a statute's substantive provisions:

> Insofar as petitioners' argument would permit common-law actions that "actually conflict" with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect. To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to "destroy itself." [Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 228 (1998).] *We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship. But there is no reason to believe Congress has done so here.*

Geier v. Am. Honda Motor Co., 529 U.S. 861, 872 (2000) (emphasis added) (citation omitted).

In support of the possibility that Congress has the authority to enact a saving clause under which state law can preempt federal law, as shown in the above quote, the Court

And, if Congress wants to create a saving clause, like ERISA's saving clause, which provides for state law preemption of such ERISA statutory provisions as § 1132(a), the Supremacy Clause would not block the enforcement of such a law.[170] This is true because the Supremacy

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relied upon footnote 16, which provides:

> The Court contends, in essence, that a saving clause cannot foreclose implied conflict pre-emption. The cases it cites to support that point, however, merely interpreted the language of the particular saving clauses at issue and concluded that those clauses did not foreclose implied pre-emption; they do not establish that a saving clause in a given statute cannot foreclose implied pre-emption based on frustration of that statute's purposes, or even (more importantly for our present purposes) that a saving clause in a given statute cannot deprive a regulation issued pursuant to that statute of any implicit pre-emptive effect. As stated in the text, I believe the language of this particular saving clause unquestionably limits, and possibly forecloses entirely, the pre-emptive effect that safety standards promulgated by the Secretary have on common-law remedies. Under that interpretation, there is by definition no frustration of federal purposes—that is, no "tolerat[ion of] actual conflict,"—when tort suits are allowed to go forward. Thus, because there is a textual basis for concluding that Congress intended to preserve the state law at issue, I think it entirely appropriate for the party favoring pre-emption to bear a special burden in attempting to show that valid federal purposes would be frustrated if that state law were not pre-empted.

Id. at 900 n.16 (Stevens, J., dissenting) (emphasis added) (citations omitted).

170. *See supra* note 169 and accompanying text. Professor Laurence H. Tribe has expressed his opinion that the McCarran-Ferguson Act, in which Congress relegated the business of insurance to state law regulation (and pursuant to which Congress enacted ERISA's saving clause), possibly runs afoul of the Supremacy Clause. TRIBE, *supra* note 130, at 1022 n.5. Professor Tribe states:

> An important federal statute that comes close to raising that constitutional difficulty (and, indeed, perhaps crosses the line) is the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), which protects certain kinds of state laws—namely, those enacted "for the purpose of regulating the business of insurance"—from being "invalidated[d], impair[ed], or supersede[d]" by any other federal statute, including one enacted by a future Congress, that does not "specifically relat[e] to the business of insurance." If McCarran-Ferguson were read as its text plainly suggests Congress meant it to be—as giving certain insurance-related state laws a privileged place with respect to statutes promulgated by future Congresses—it would violate both the principle that Congress may not by statute repeal the Supremacy Clause and the principle that one Congress may not bind its successors. Perhaps to avoid this awkward result, the courts have characterized McCarran-Ferguson as merely an interpretive guide for assessing the preemptive effect of federal statutes—and a guide which future Congresses may freely override.

Id. (quoting 15 U.S.C. § 1012(b)) (alterations in original). However, Professor Tribe does recognize that Congress can avoid violation of the Supremacy Clause by incorporating the relevant state law regulation into the relevant federal statute:

> To be precise, because the Supremacy Clause entails the conclusion that any valid federal statute prevails over any state law with which it conflicts,

> including a state law enacted for the purpose of regulating the insurance business regardless of whether that federal statute deals specifically with the business of insurance, *the only clearly constitutional way that Congress can preserve a state law regulating insurance from being overridden by a statute Congress enacts that conflicts with the state law is to eliminate the conflict by specifying, in the congressional statute itself, that state laws such as the one in question are to remain operative, thereby essentially incorporating the state law in question into the federal statute*. . . . For Congress to attempt to alter the background rule under which any federal statute automatically supersedes any state law with which it conflicts—which is, after all, a rule of constitutional law giving operative meaning to the Supremacy Clause itself—is for Congress to seek to do by statute what the Constitution clearly requires an amendment to accomplish.

Id. at 1023 n.5 (emphasis added).

Under Professor Tribe's rationale, Congress' enactment of ERISA's saving clause, which is premised upon the McCarran-Ferguson Act's relegation of the business of insurance to state law regulation, survives preemption by the Supremacy Clause. This is because, by including ERISA's saving clause within ERISA's statutory provisions, Congress, through the saving clause, has incorporated state law regulation of insurance within ERISA's statutory framework, thereby making state law regulation of insurance a part of ERISA's substantive provisions. Given the incorporation of state law regulation of insurance into ERISA's statutory scheme, the only remaining question should be whether Congress intended that ERISA's saving clause be interpreted such that, in regulating insurance, states can offer compensatory and punitive damages that are not allowable under § 1132(a) of ERISA's statutory provisions. Pursuant to a plain meaning interpretation of ERISA's preemption clause and saving clause, the answer is that Congress did intend states to have the authority to grant such damages. *See supra* text accompanying notes 73–79.

This Author accepts Professor Tribe's incorporation theory, as informed by a plain meaning interpretation of the scope of ERISA's saving clause and ERISA's preemption clause which, as argued above, would allow a state to grant compensatory and punitive damages despite the fact that these damages are not allowable under § 1132(a). However, this Author believes that another way of resolving the issue is by accepting that, when Congress enacted ERISA's preemption clause and saving clause, it attempted to make a distinction between ERISA plans that are regulated by state law under the saving clause and ERISA plans that are not regulated by state law under the saving clause. Given the distinction, the next logical conclusion is that Congress intended that ERISA's civil enforcement provisions be applicable only when an ERISA plan is not subject to state law regulation under ERISA's saving clause. This conclusion is appropriate because it is consistent with the plain meaning language of ERISA's preemption clause and saving clause, and because it is the one interpretation that would enforce ERISA and its saving clause to the fullest extent of its permissible construction.

Furthermore, the Court has already recognized that, through ERISA's saving clause, states can regulate insurance ERISA plans (that are funded with insurance policies and with HMOs' coverage that is insurance-like) and that states cannot regulate self-insured ERISA plans because such a distinction is the best reconciliation of the mandates of ERISA's saving clause and deemer clause. Consistent with that distinction, the Court should acknowledge that, to give full force and effect to the plain meaning language of ERISA's saving clause, preemption clause, and to § 1132(a)'s civil enforcement provisions, the best interpretation is that § 1132(a) remedies apply only to self-insured plans and to other plans that do not fall within the scope of permissible state law regulation of insurance under ERISA's saving clause. Consistently, when an ERISA plan does fall within a permissible state regulation of insurance under ERISA's saving clause, the Court should hold that § 1132(a) is not applicable and that states are free to provide compensatory and punitive damage remedies to an injured beneficiary. This

Clause is not self-executing to the extent that a federal statute must always preempt inconsistent state laws, even when Congress—through its intent as expressed in the language of saving clauses—wants to preserve the inconsistent state laws. The conclusion is all the more true when one interprets the Supremacy Clause in light of its anti-state encroachment policy, which is not implicated and should not be used to override a Congressional enactment when Congress, in the exercise of its "discretionary federal preemption" authority, has struck a balance in favor of state law regulation even when, as with ERISA's saving clause, the state law might preempt ERISA's statutory provisions.

Given the above discussion, it seems logical that a saving clause and a preemption clause, regardless of the scope of their coverage, are the decisive authority for determining when federal preemption occurs. Another way of saying this is that, when a federal statute's saving clause exempts certain state laws from federal preemption, it is as if the federal statute no longer applies to the exempted areas of state law regulation.[171] And therefore, the Supremacy Clause would not mandate federal preemption of those exempted state laws because the Supremacy Clause requires preemption only when a federal statue is applicable and when

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distinction between when § 1132(a) is applicable, and when it is not applicable, gives the fullest meaning to the language of ERISA's preemption clause and saving clause, just as the distinction between insurance plans and self-insurance plans give the broadest meaning to ERISA's saving clause and deemer clause.

Furthermore, Professor Tribe appears to be of the opinion that a court should strictly interpret a federal statute's saving clause to enforce Congress' intent against preemption of state laws that fall within the saving clause's scope:

> *To engage in such a broader inquiry is to forget that preemption is ultimately a matter of construing a federal statute; when the statute contains its own clearly applicable preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads, is pursuing a fundamentally lawless path.*

TRIBE, *supra* note 130, at 1181 n.10 (emphasis added).

171. Professor Tribe appears to say that, instead of the federal statute not being applicable to the areas that have been relegated to state regulation, the federal statute incorporates the state law. TRIBE, *supra* note 130, at 1023 n.5. However, in the context of whether a saving clause-protected state law preempts § 1132(a), analytically it might be better to say that § 1132(a), and the other provisions of subchapters I and III of ERISA, are not applicable because ERISA's preemption clause states that § 1132(a) and the provisions of subchapters I and III supersede (are applicable) "[e]xcept as provided in subsection (b) of this section," subsection (b) being ERISA's saving clause. 29 U.S.C. § 1144(a) (2000). The gist of this statement is that such ERISA provisions are not applicable if a state law falls within the scope of ERISA's saving clause.

there is an inconsistent state law that is not saved from preemption.[172]

This conclusion applies to ERISA's saving clause and to whether a state law can preempt § 1132(a). More specifically, an ERISA's saving clause-protected state law that imposes remedies that are different than the remedies that § 1132(a) imposes should not be preempted by § 1132(a) because § 1132(a) is not applicable, given that Congress—through ERISA's saving clause and ERISA's preemption clause—gave states the authority to regulate insurance, which should include the regulation of the remedies to which an injured beneficiary is entitled.[173]

To the extent that the Court, through an alleged statutory construction, attempts to apply the Supremacy Clause to thwart Congress' intent regarding ERISA's saving clause and state law regulation of insurance, this would be impermissible judicial lawmaking. The Court has no legitimate authority to overrule Congressional intent by making its own laws that are premised upon its own beliefs about the proper balance to be struck in areas involving public policy choices that Congress has resolved in favor of state law regulation of insurance.[174]

In the final analysis, it should be noted that using the Supremacy Clause to prevent an expansive application of ERISA's saving clause, one which preempts § 1132(a) of ERISA's civil enforcement provisions, would be inconsistent with the Court's precedents regarding federal preemption. In the ERISA context, as in other areas of the law, the Court has considered issues regarding a federal statute's preemption of state law as a matter of statutory interpretation or construction of the relevant federal statute.[175] The decisive question has been whether Congress, in the

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172. In other words, if Congress, by reserving certain areas for state law regulation, intends that federal law not control in such areas, there will be no conflict between the state law and the federal law because, in those areas, the federal law is inapplicable and nonexistent; therefore, there is no applicable federal law to conflict with the saved state law.

173. *See supra* text accompanying notes 73–79. § 1132(a) is not applicable because the clear and plain language of ERISA's preemption clause provides that § 1132(a), being a section of subchapter one, shall not preempt state laws that fall within the scope of ERISA's saving clause. *See id*.

174. *Cf.* TRIBE, supra note 130, at 1181 n.10 (asserting that "when the statute contains its own clearly applicable preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads, is pursuing a fundamentally lawless path.").

Id.

175. For an example of the Court's reliance on statutory construction in the ERISA preemption context, see *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance*, 514 U.S. 645, 655 (1995) (asserting that "[s]ince pre-emption claims turn on Congress's intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs") (citation omitted); Pilot Life Ins.

statute's language, legislative history, or structure of the statute, intended to preempt state law in a particular area.[176] If the statute's language is clear as to Congressional intent, the Court mostly defers to that intent.[177] The same should apply for issues involving ERISA's saving clause's preemptive effects on § 1132(a) of ERISA's civil enforcement provisions. Therefore, if the Court continues using statutory construction as a means of determining ERISA's preemption and saving clause issues, and if it applies its rule that unambiguous statutory provisions should be interpreted as written,[178] the Court would be justified in holding that, pursuant to a plain meaning interpretation, Congress intended that a saving clause-protected state law preempts § 1132(a) of ERISA's civil enforcement provisions.[179]

The Court should recognize that if Congress had wanted to limit the reach of ERISA's saving clause, such that a saving clause-protected state law would be preempted if it conflicts with § 1132(a), then Congress would have written such a limitation into the language of either ERISA's preemption clause or saving clause. For example, Congress wrote the limitation into the saving clause contained in section 78bb(a) of the

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Co. v. Dedeaux, 481 U.S. 41, 45 (1987) (stating that "[t]he question whether a certain state action is pre-empted by federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchstone'") (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985)). In the non-ERISA context, for examples of the Court's use of statutory construction, see Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001) ("In these cases, our task is to identify the domain expressly pre-empted, because 'an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters.' Congressional purpose is the 'ultimate touchstone' of our inquiry.") (quoting Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992)); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (1996) ("'[T]he purpose of Congress is the ultimate touchstone' in every pre-emption case. [*Cipollone*, 505 U.S. at 516.] As a result, any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional* purpose.' *Cipollone*, 505 U.S. at 530. Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it.") (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring)).

176. *See Travelers Ins.*, 514 U.S. at 655 (asserting that "[s]ince pre-emption claims turn on Congress's intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs") (citations omitted).

177. *See supra* text accompanying note 63.

178. *See id.*

179. It should be noted that, in drafting ERISA's preemption clause and saving clause, Congress did not put any limitations on the scope of the saving clause, other than ERISA's deemer clause. *See supra* text accompanying notes 73–79.

Securities Exchange Act of 1934, which preserves state jurisdiction over "any security or any person insofar as it *does not conflict* with the provisions of this chapter or the rules and regulations thereunder."[180] If Congress could write such a limitation into a 1934 statute, then there is no reason to believe that it could not have written the limitation into a 1974 statute like ERISA. The analogy of section 78bb(a) to an absence of the same limitation in ERISA's saving clause is persuasive. When the analogy is considered in light of the plain, unambiguous language of ERISA's preemption clause and saving clause, the Court should hold that Congress did not intend that § 1132(a) be a limitation on the enforcement of a saving clause-protected state law that offers remedies that are different than the remedies offered by § 1132(a). In other words, ERISA's preemption clause and saving clause clearly show Congress' intent that a saving clause-protected state law preempts § 1132(a) of ERISA's civil enforcement provisions.

As a final point, to the extent that the Court might try to say that the "structure and purpose of [ERISA] as a whole," and the Court's "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law,"[181] show a Congressional intent that § 1132(a) preempts an inconsistent saving clause-protected law, the Court should use caution by acknowledging at least two of the principles that have controlled its discretion when deciding whether Congress intended to preempt state law. First, there is a presumption that Congress did not intend to preempt traditional state police powers regulations unless Congress' intent is clearly and manifestly shown.[182] In light of this presumption, the Court should resolve any ambiguity, about whether § 1132(a) preempts an inconsistent saving clause-protected state law,

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180. Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) (emphasis added). Section 78bb(a), in relevant parts, provides:

> [N]othing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person *insofar as it does not conflict* with the provisions of this chapter or the rules and regulations thereunder.

Id. (emphasis added).

181. *See* Medtronic Inc. v. Lohr, 518 U.S. 470, 476 (1996) (asserting that "[a]lso relevant, however, is the 'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law") (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992)).

182. *See* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. 645, 655 (1995) ("[W]e have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

against such preemption.[183] Along these lines, to the extent that the Court does not accept that a plain meaning interpretation of ERISA's preemption clause and saving clause shows a Congressional intent that a saving clause-protected law can preempt § 1132(a)'s remedies, at a minimum the Court should recognize that Congress' inclusion of a broad saving clause within ERISA's statutory framework, when § 1132(a) exists in the same framework, shows that there is ambiguity regarding Congress' intent as to whether § 1132(a) preempts a saving clause-protected law. Therefore, the Court should apply the presumption against preemption of the state law and construe ERISA's preemption clause and saving clause to the fullest extent of their plain meaning language.[184]

Second, any attempt by the Court (other than one applying the presumption against preemption) to resolve any alleged ambiguity over the preemptive effects of § 1132(a), by using the Court's "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law,"[185] is doomed to fail. Not only will such an attempt lead to judicial lawmaking where the Court, itself, will make the public policy decision regarding how the balance should be struck regarding § 1132(a)'s preemptive effect,[186] but such an attempt to save Congress from its own failure to more clearly draft the preemption clause and saving clause—to the extent that a plain

183. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 592 n.1 (2001).

> The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. *In such cases, the question is not whether Congress intended to pre-empt state regulation, but to what extent. We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language*.

Id. (emphasis added).

It should be noted that the position taken in this Article is that ERISA's preemption clause and saving clause clearly and unambiguously show a congressional intent that a saving clause-protected state law can preempt §1132(a)'s remedies. As such, this Article discusses any ambiguity that the Court might allege because of the inclusion of ERISA's saving clause in the same statute that contains §1132(a) only as a fall-back position. In other words, even if the Court were to find that ERISA is ambiguous regarding whether a saving clause-protected state law can preempt §1132(a), any such ambiguity should be construed in favor of a saving clause-protected state law's preemption of §1132(a), pursuant to the presumption against the preemption of states' police powers regulations.

184. *See supra* note 183 and accompanying text.

185. *Medtronic*, 518 U.S. at 486.

186. For criticism of such judicial lawmaking by the Court when interpreting express preemption clauses and express saving clauses, see TRIBE, *supra* note 130, at 1181 n.10.

meaning interpretation, as proposed in this Article, is not clear enough—will simply further delay the time when Congress will be forced to revisit ERISA's statutory language and make whatever changes are needed to more clearly state its intent regarding the scope of ERISA's preemption clause and saving clause, and these clauses' impact on § 1132(a) of ERISA's civil enforcement provisions. As long as the Court continues to bail out Congress from the confusion surrounding ERISA's preemption, there will be no urgency for Congress to clarify any ambiguity that currently exists in ERISA's preemption framework. Given that Congress has shown that it can amend or change preemption clauses to make them more workable as time passes,[187] the Court and lower-level federal courts, consistent with the presumption against preemption when Congress' intent to preempt is not clear and manifest, should apply a plain meaning interpretation of ERISA's preemption clause and saving clause, and hold that a saving clause-protected state law can preempt § 1132(a) of ERISA's civil enforcement provisions.

VII. CONCLUSION

At some point in the future, the Court and lower-level federal courts will have to decide whether an ERISA's saving clause-protected state law can preempt § 1132(a) of ERISA's civil enforcement provisions. This is one of the most important ERISA preemption issues that remains unresolved. In resolving the issue, all courts should apply a plain meaning interpretation of ERISA's preemption clause and saving clause. Such an interpretation will be broader than what currently exists. And, using that broad interpretation, some states might enact laws similar to the hypothetical statute that appears at the beginning of this Article. States might codify such statutes to provide employees and their beneficiaries with a cause of action for compensatory and punitive damages stemming from an insurance company's or HMO's failure to follow the rules and procedures that such statutes mandate. These compensatory and punitive damages will be very beneficial to many injured employees and beneficiaries who presently do not have access to such damages under § 1132(a) of ERISA's civil enforcement provisions.[188] The main theme of this Article is that states, pursuant to the plain meaning language of

187. A good example of Congress' ability to amend or change preemption clauses is shown by Congress' changing of the preemption clause contained in the Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. §§ 1331–1341 (2000). *See Lorillard Tobacco*, 533 U.S. at 541–45 (discussing the different changes that Congress has made to the FCLAA).

188. Under § 1132(a), an employee or beneficiary is entitled to only the monetary value of denied benefits and not to compensatory damages. Mertens v. Hewitt Assocs., 508 U.S. 248, 260–61 (1993).

ERISA's saving clause and preemption clause, should have the authority to enact statutes that preempt § 1132(a) of ERISA's civil enforcement provisions.